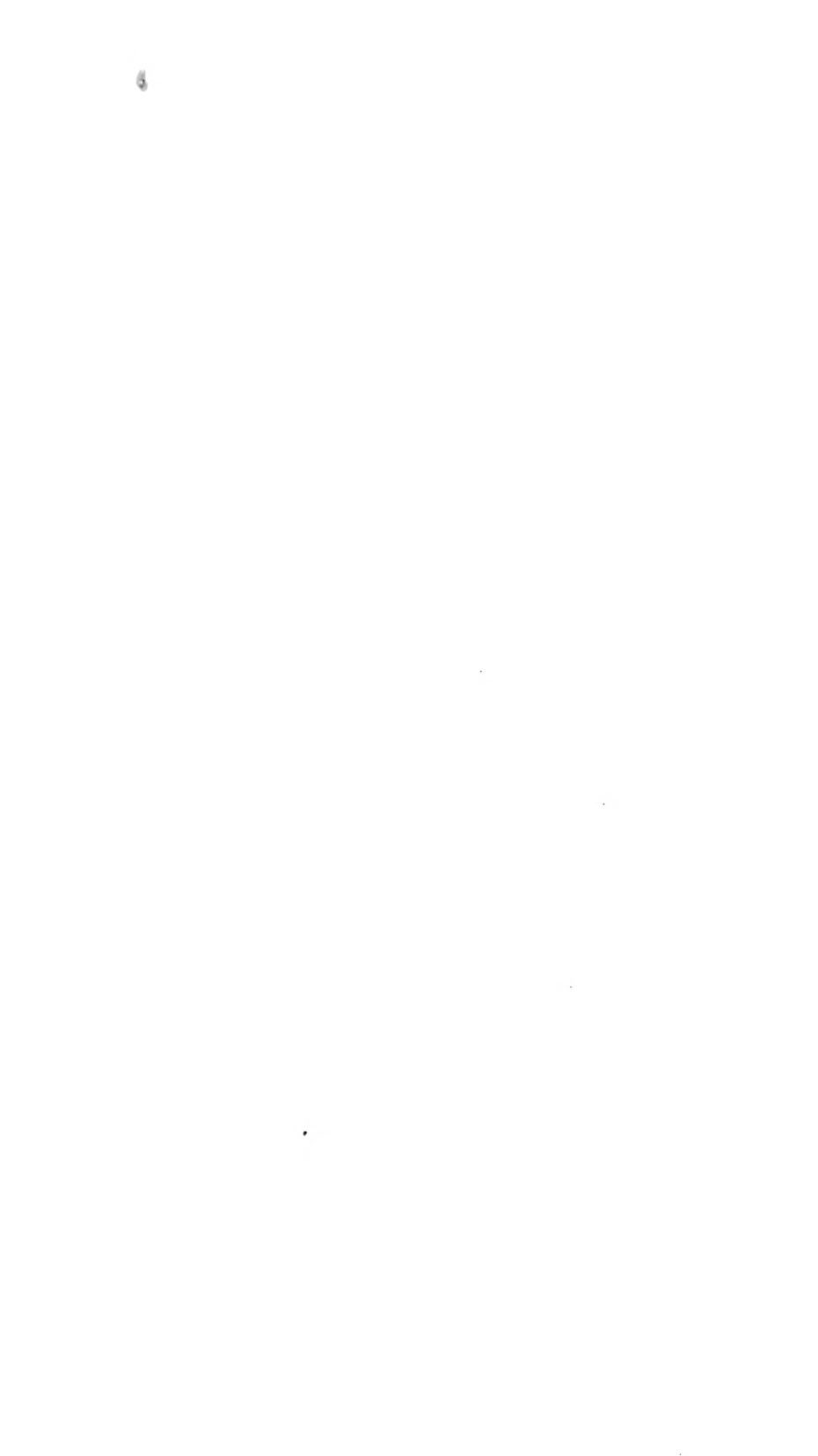


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A BRIEF

FOR

THE TRIAL OF CIVIL ISSUES

BEFORE

A JURY

BY AUSTIN ABBOTT

It is equally important to know the exact extent and limit of a
right, whether counsel intends to insist, or
thinks wiser to let it pass

SECOND AND ENLARGED EDITION
BY THE PUBLISHERS' EDITORIAL STAFF

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY

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PREFACE TO THE FIRST EDITION.

While the merits of every case may be a fair field for the contest of opposing opinion, the main rules of practice according to which that contest is to be carried on ought to be well understood and applied with as little difference of opinion as may be. The chief burden under which the business of the profession and the labors of the bench now suffer is the great number of mistrials, and consequent new trials, which result from the imperfect manner in which these rules are understood and applied.

In these pages, which are the outgrowth of briefs I have had occasion to prepare in practice, I have endeavored to state fairly the rules of forensic contest, on points that are frequently so disputed as to make it desirable to be prepared to cite authority at the trial.

I mention, however, only a small proportion of the authorities examined, believing that for the purpose of a brief a few well chosen are more useful than a mass. On questions of chief importance I have, however, given one or more recent authorities from each of a number of states.

Space has not allowed a full statement of the statutes and rules of court of other jurisdictions than New York; but I trust that I have indicated the existence of such statutes in such a way that the intelligent practitioner in any jurisdiction cannot be misled.

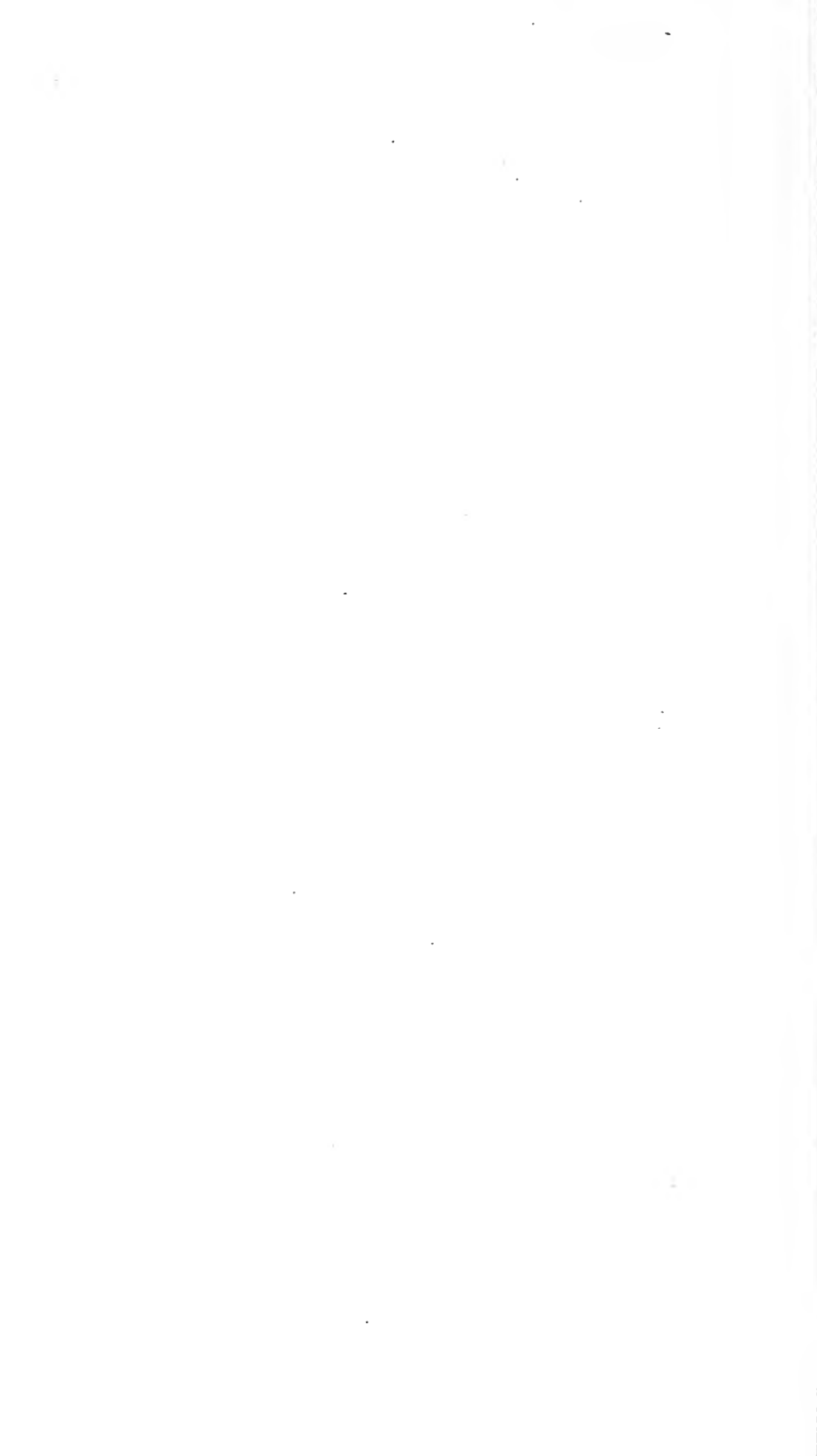
In making up a list of Useful Authorities on Evidence (Division XV.), I have not confined myself to stating what I deem to be settled law, deeming it there more useful to index concisely the best authorities, including some debatable points, rather than to take space to state each rule at length.

In these days more good verdicts are set aside, or hopes of verdict frustrated, by errors in regard to whether the case should go to the jury or not, than from any other cause. On the subject of Taking the Case from the Jury (Division XIX.), I have stated the rules which, if I rightly understand the existing law as to New Trials and Appeal, ought to govern our trial courts in disposing of motions for a nonsuit, or to direct a verdict, and demurrers to evidence. I am not aware that these rules are anywhere else shortly and systematically stated, nor have I found it practicable to state them concisely and correctly by following the language of the reports. But they may be seen constantly applied in practice by the ablest judges, and their application is now habitually sustained and enforced with remarkable consistency by the leading appellate courts. They are both reasonable and useful; and, indeed, all that is modern in them is the necessary result of modern changes in the law of evidence and review; and in those states where, as shown by notes appended to the rules, they are not yet fully adopted, a general progress toward their adoption is clearly traceable in the current of decision.

If this little volume serves to facilitate the prompt and correct disposal of business at the circuit, its principal object will be accomplished.

AUSTIN ABBOTT.

71 Broadway, New York,
Aug. 15, 1885.



PREFACE TO THE SECOND EDITION.

Mr. Abbott's well-known Brief on Civil Jury Trials has proved a constant convenience to lawyers for ready reference on questions of trial practice. But a new edition has seemed necessary by reason of the numerous decisions rendered during the fifteen years that have passed since the publication of the first edition. This has been most carefully prepared, with the fewest possible changes in the original text, but with much new matter to represent many additional and important points of practice.

The enlargement of some of the original divisions has more than doubled the quantity of matter and the number of questions included therein. For instance, the sixteen sections in the first division as it formerly stood have now become thirty-nine, each new section representing an additional point of practice. Five entirely new divisions have been added on several subjects not treated in the first edition, and the importance of which needs no comment. They are: (1) Examination of Witnesses; (2) Impeachment and Corroboration of Witnesses; (3) Absence of Judge and Proceedings Outside of Courtroom; (4) Improper Conduct of Judge; (5) The Verdict and Its Incidents. The division on Exceptions also is almost entirely new. From a brief mention of three points it has been enlarged to cover the whole range of the Necessity, Form, Time, and Sufficiency of the Taking of Exceptions. The total number of questions of practice that are now treated, as well as the total quantity of the matter included in the new edition, has been much more than doubled, and we trust that the practical value of the book has been equally increased.

The original work was chiefly, though not exclusively, a work on New York practice. The new edition has been made equally valuable in all other states.

THE L. C. P. CO



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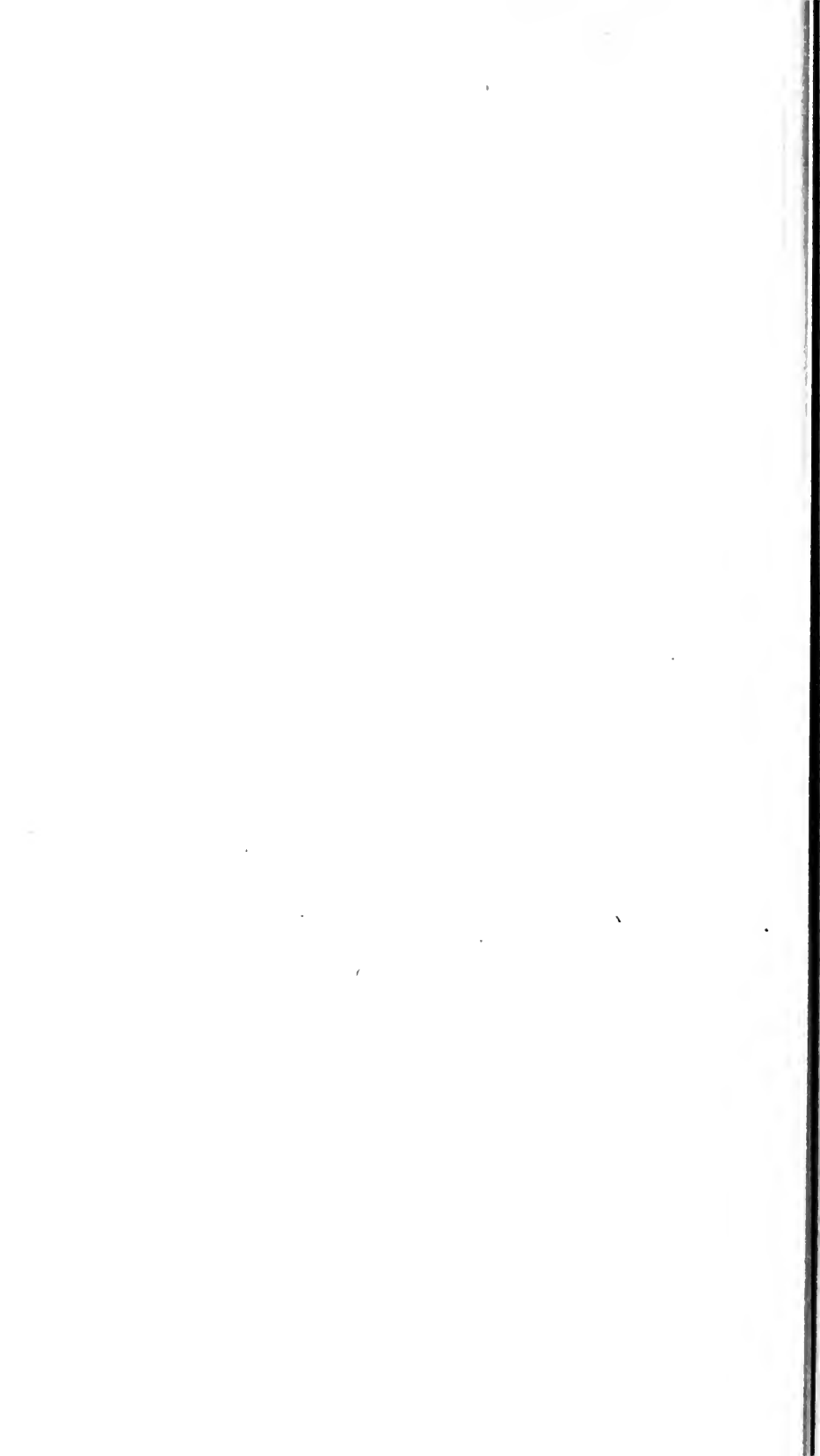
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BRIEF

— ON —

Jury Trial in Civil Actions.

I.—APPLICATIONS TO POSTPONE.

[The diversity in laxity and strictness in different courts in applying these rules makes it important to notice that they ought to be administered in view of the consideration that the right of trial by jury involves on the one hand the right to a reasonably prompt trial, and on the other hand the right to reasonable opportunity to get one's evidence in court and to have his witnesses examined there under oath. Hence has arisen the modern rule that, at least after a first postponement, an application for further postponement involves a question of right; and although the grounds are necessarily to some extent discretionary, the exercise of the discretion is generally reviewable, at least by the full bench in the same court, and usually, in case of the inferior state courts, by the appellate court.]

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|--|---|
| 1. Necessity for application and order. | 8. — for perfecting or serving process, or bringing in parties. |
| 2. Time for application. | 9. — for purpose of obtaining jury. |
| 3. Notice of application. | 10. — matters pertaining to pleadings or issues. |
| 4. Who may make application. | 11. — want of preparation. |
| 5. Grounds; matters affecting the cause of action. | 12. — surprise at trial. |
| 6. — service too recent before term. | 13. — absence of the party. |
| 7. — public excitement or prejudice. | 14. — absence of counsel. |

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| 15. — absence of witness; neglect to subpœna. | 27. — who to make. |
| 16. — — or to take deposition. | 28. — contents. |
| 17. — absence of foreign witness. | 29. — — disclosing materiality. |
| 18. — — no opportunity to procure. | 30. Opposing the motion; presumptions. |
| 19. — absence of documentary evidence. | 31. — counter-affidavits. |
| 20. — discovery and production. | 32. — admitting desired facts. |
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| 22. — materiality of witness or evidence. | 34. — stipulation against abatement. |
| 23. — probable attendance or procurement. | 35. — staying another suit. |
| 24. — incompetency, immateriality, irrelevancy, etc. | 36. Remedy for refusal. |
| 25. Affidavit may be required. | 37. Postponements by agreement or consent. |
| 26. — sufficiency. | 38. Postponements by operation of law. |
| | 39. Postponements by justices of the peace. |

1. Necessity for application and order.

A party desiring a postponement should make formal application therefor;¹ but a statement by the court, in response to a request for leave to prepare and file a formal application, that any application will be unavailing, dispenses with the necessity of a written application.²

¹*Camp v. Morgan*, 81 Ga. 740, 8 S. E. 422; *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372; *Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893; *Dillard v. Dillard* (Va.) 21 S. E. 669; *Taylor v. Cox*, 32 W. Va. 158, 9 S. E. 70.

²*Nichols v. Headley Grocer Co.* 66 Mo. App. 321.

On court's own motion.—The court may of its own motion continue a cause indefinitely on failure of the parties to appear on the day set for trial.¹

¹*Kiefer v. Clark County Comrs.* 4 Ohio N. P. 282.

2. Time for application.

An application to postpone, made after the applicant has announced ready for trial¹ or during trial,² will not be entertained, unless for causes arising at trial.³ And an application not filed within the time specified by rule of court, without good cause shown for the delay, is properly refused.⁴

¹*Hinkle v. Story*, 96 Ga. 776, 22 S. E. 334.

²*Leavitt v. Kennicott*, 54 Ill. App. 633; *Knauber v. Watson*, 50 Kan. 702, 32 Pac. 349.

⁴A continuance on the ground of surprise must be asked for at the time

of the alleged surprise. *Hughes v. Richter*, 161 Ill. 409, 43 N. E. 1066. If not, the court in its discretion may refuse it. *Winn v. Reed*, 61 Mo. App. 621. See also *Garrett v. Wood*, 24 App. Div. 620, 48 N. Y. Supp. 1002. For postponement for causes arising at trial, see *post*, § 12.

⁴Under Michigan court rule 22, prohibiting hearing of applications to postpone made after the first day of the term, an application made the second week of the term will be denied in the absence of excuse shown for the delay. *Schurtz v. Kelley* (Mich.) 5 Det. L. N. 844, 78 N. W. 332.

In Illinois, if plaintiff fails to file a statement of account sued on ten days before the term, defendant is entitled to either continuance or rule on plaintiff to file the statement; but after pleading, defendant cannot raise the objection at trial and also demand a continuance.¹

¹*Dunker v. Schlotfeldt*, 49 Ill. App. 652 (after plea in bar). See also *Teeter v. Poe*, 48 Ill. App. 158. And in *Coffeen Coal & C. Co. v. Barry*, 56 Ill. App. 587, it was held that a continuance asked because plaintiff failed to file a copy of the account sued on ten days before term was properly refused, where an account was filed, though not so detailed and itemized as defendant was entitled to, after which defendant obtained an order for a bill of particulars, under which a detailed statement was filed.

3. Notice of application.

A party intending to apply for postponement must notify his adversary of such intention at the earliest opportunity.¹

¹*Gaynor v. Crandall*, 44 Ill. App. 511.

4. Who may make application.

An application by a party as to whom the case has been dismissed will not be entertained.¹

¹Thus, in replevin against an attaching creditor and constable, an application to postpone by the attaching creditor after dismissal of the case as to him will be denied. *Burgwald v. Donelson*, 2 Kan. App. 301, 43 Pac. 100.

5. Grounds; matters affecting the cause of action.

Another suit pending.—A continuance is proper where the facts show that justice requires that the case shall await the result of another suit between the parties.¹ But not where the parties are not the same,² and the result of the other suit can in no way affect the suit sought to be postponed;³ nor where the court in which the other suit is pending expressly refuses to assume jurisdiction thereof, and the jurisdiction of the court over the cause sought to be postponed is unquestioned.⁴ The application is, however, addressed to the discretion of the court.⁵

¹*Clark v. Clough*, 62 N. H. 693; *E. F. Kirwan Mfg. Co. v. Truzton* (Del.) 42 Atl. 988. And see *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159. As, where the judgment in the other suit would operate as a bar or estoppel to the action sought to be continued. *Standard Implement Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366. Or the other suit is pleadable in abatement. *Becker v. Lebanon & M. Street R. Co.* 9 Pa. Super. Ct. 102. And in *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159, it was held that the trial court might, on motion for continuance, hear and consider, as ground for the motion, an order previously granted in another proceeding not yet finally determined, which might materially affect the judgment in the pending action, though it was not set up in the pleadings.

The contrary rule, however, was announced in *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95; but the court suggested that on a proper application for stay of proceedings, a different question would be presented.

Proceedings on appeal.—It is not error to deny plaintiff's general request to continue the action to await the result of an intended appeal from an order sustaining exceptions to interrogatories which he sought to attach to his answer to his petition, even conceding that an appeal would lie from such an order. *Theis v. Chicago & N. W. R. Co.* 107 Iowa, 522, 78 N. W. 199. And *Topeka v. Smelser*, 5 Kan. App. 95, 48 Pac. 874, holds that the institution of proceedings in error to review order for new trial in the supreme court does not of itself operate to suspend further proceedings in the case in the lower court, or entitle plaintiff in error as matter of right to continuance until the proceedings in error are disposed of.

²*Cates v. Mayes* (Tex.) 12 S. W. 51.

³*Ft. Dodge v. Minneapolis & St. L. R. Co.* 87 Iowa, 389, 54 N. W. 243.

⁴*Caledonia Ins. Co. v. Wenar* (Tex. Civ. App.) 34 S. W. 385. And refusal to postpone for this reason is not a refusal to give full faith and credit to judicial proceedings of another state, within the prohibition of U. S. Const. art. 4, §§ 1, 2.

⁵*Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67; *Colorado Midland R. Co. v. Bowles*, 14 Colo. 85, 23 Pac. 467; *Becker v. Lebanon & M. Street R. Co.* 9 Pa. Super. Ct. 102.

Settlement pending.—Postponement of a cause, because of a pending proposition of settlement, after two previous postponements for the same reason, is properly refused where the court stated at the last preceding postponement that the case would not be again postponed on that ground, and no other ground is assigned.¹

¹*Woodward v. Burch*, 105 Ga. 484, 30 S. E. 730.

Garnishment proceedings.—Proceedings in garnishment may be postponed for final disposition until the termination of a contract under which rights and interest will accrue to the judgment debtor.¹

¹*J. A. Fay & E. Co. v. Ouachita Excelsior Saw & P. Mills*, 50 La. Ann. 205, 23 So. 312.

But in *Drake v. Catlin*, 18 Wash. 316, 51 Pac. 396, the right to continue garnishment proceedings until the expiration of a lease to the garnishee of household furniture was denied; but under the statute there was no right to garnish such chattels.

6. — service too recent before term.

Some statutes provide that a cause must be continued where service of summons is not perfected a sufficient length of time before the return day or term for the cause to be ripe for trial.¹

¹Thus, a Colorado statute provides that on notice by publication, if the first publication is not sixty days before the day named in the summons the cause must be continued to the next term. *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611. But this does not require a continuance to a third term because there were less than sixty days intervening between the issuance of the summons and the first day of the second term. *Ibid.*

7. — public excitement or prejudice.

Ordinarily, public excitement or prejudice is not deemed sufficient ground for postponement, where the statute authorizes a party to ascertain the state of mind of the juror by examining him preliminary to challenge,¹ or allows the party a change of venue.²

¹*Courier-Journal Co. v. Sallee*, 20 Ky. L. Rep. 634, 47 S. W. 226.

²*State v. Hawkins*, 18 Or. 477, 23 Pac. 475; *Joyce v. Com.* 78 Va. 287.

8. — for perfecting or serving process, or bringing in parties.

Amending defective return.—Defendant is not entitled to a postponement because of an amendment of the return to show valid service of process, allowed on the same day on which the cause had been by consent previously set for trial.¹

¹*Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

Serving or bringing in parties.—The trial court may in its discretion permit such continuances as may appear to be reasonably necessary to bring in defendants not served,¹ or to bring in as necessary parties persons not previously named as such;² but not to allow disinterested persons to be made parties.³

¹Thus, in a case where judgment must be against all the defendants or none. *Simpson v. Watson*, 15 Mo. App. 425. This was a case on scire facias to revive a judgment, and it was held that because the writ must pursue the nature of the judgment, which was joint, the scire facias must also be joint, and that therefore a continuance to serve one of the defendants was proper, notwithstanding the statutes provide that, where there are several defendants, some of whom do not appear or are not

summoned, plaintiff may dismiss as to those not served, and proceed against the others, or continue the cause to bring in the others. But in *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267, an action by a subcontractor to enforce a mechanic's lien, the original contractors, who were jointly liable, were impleaded as defendants, but only one of them served; and it was held not error to deny a continuance to serve the other because, under the statute, judgment could be rendered against both of them, enforceable against their joint property and the separate property of the one served.

And in *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725, it is held that the postponement of the trial of issues between plaintiff and one defendant until the other defendants have been served and their time to plead has expired rests in the discretion of the trial court, and will not be reviewed on appeal.

Thus, a sheriff sued for damages for an official act for which he has taken an indemnifying bond is entitled to a continuance for one term to bring in as parties the makers of the bond. *Rains v. Herring*, 68 Tex. 468, 5 S. W. 369, holding refusal error after applicant has brought himself strictly within the statute providing for such a continuance.

But error, if any, in refusing the application of defendant in an action to foreclose a vendor's lien, to enable him to bring in the sheriff and his sureties, to recover damages against them for the wrongful levy of a writ of sequestration, was waived where he afterward withdrew his claim for such damages, and announced that he would press that claim in a separate suit, and did so. *Robertson v. Parrish* (Tex. Civ. App.) 39 S. W. 646.

**Chicago, St. L. & W. R. Co. v. Gates*, 120 Ill. 86, 11 N. E. 527.

9. — for purpose of obtaining jury.

The right of trial by a jury is good ground for postponing the trial of a cause, if the applicant has fully complied with the law entitling him to a jury, and a jury is not available when the trial is called.

Thus, in *Burrows v. Rust* (Tex. Civ. App.) 44 S. W. 1019, where the parties had not announced ready when the jury were in attendance, and the court had not then required trial, it was held that upon the discharge of the jury the cause was continued by operation of law, and that denial of a party's demand for continuance in order to preserve his right of jury trial after he had paid the required jury fee, and forcing him to a trial at that term without a jury, was reversible error. But where the cause had been set for trial by the parties themselves for a day after the discharge of the jury for the term, this ground was not available. *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

And the trial court may, on disability of a juror, order an adjournment and continuance of a case which in any event cannot be concluded at the present term, until a day certain of the next term, under an Indiana statute providing for continuance of the court's sitting where a case is progressing at the expiration of a term fixed by law. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208.

To fill the panel.—Adjourning a trial over one day to permit completion of the jury from the regular panel, rather than from talesmen, is neither an abuse of discretion nor a violation of law.¹

¹*Cook v. Fogarty*, 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677.

10. — matters pertaining to pleadings or issues.

Amendment of pleadings.—Amendment of a pleading or filing a substituted or supplemental pleading at trial is not sufficient ground for postponement unless it becomes necessary in order to promote the ends of justice and secure a fair trial of the issues.¹ So, an amendment which merely supplies formal parts of the pleading, without in any manner affecting the issues, or which conforms it to the proofs or to the facts,² or one which raises immaterial issues,³ will not demand a postponement. Nor will an amendment justify postponement if in fact there is no surprise and the application is for delay only.⁴ Otherwise, however, of an amendment which materially changes the issues or raises entirely new ones.⁵

¹*Armstrong v. Factoryville*, 10 Pa. Co. Ct. 274; *Pifer v. Stanley*, 57 Mo. App. 516; *Beshoar v. Robards*, 8 Colo. App. 173, 45 Pac. 280; *Barnes v. Hekla F. Ins. Co.* 75 Iowa, 11, 39 N. W. 122.

As a trial amendment praying for the recovery of interest on the interest-bearing notes sued on and offered in evidence, but which was not asked in the original petition. *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125.

Or an additional reply filed at the trial, where the material facts pleaded therein were in issue under the original. *Magnuson v. Billings* (Ind.) 52 N. E. 803.

The application, however, is addressed to the discretion of the trial court. *Alamo F. Ins. Co. v. Schacklett* (Tex. Civ. App.) 26 S. W. 630.

And a refusal of time to meet averments in an amended statement and holding counsel to a choice between a general continuance and an immediate trial, after the cause had already been manipulated on the list to suit counsel's convenience, are not reversible error. *Clow v. Pittsburgh Traction Co.* 158 Pa. 410, 27 Atl. 1004.

²*Barnes v. Scott*, 29 Fla. 285, 11 So. 48; *State ex rel. Rogers v. Gage*, 52 Mo. App. 464; *Western Brewery Co. v. Meredith*, 166 Ill. 306, 46 N. E. 720; *Union P. R. Co. v. Motzner* (Kan. App.) 55 Pac. 670. Especially where issues were joined without asking a postponement at the time, and the affidavit on the subsequent motion shows merely affiant's opinion that he has a just defense to part of the cause of action which he can, if given time, present and sustain, but the extent of which is not disclosed. *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

Thus, an amendment of a declaration merely to conform to proofs will not justify a postponement, where there is no surprise and all the witnesses

who could testify to the matters alleged were before the court and had already been examined in relation thereto. *Mack v. Porter*, 25 U. S. App. 595, 72 Fed. Rep. 236, 18 C. C. A. 527. See also *Crane Lumber Co. v. Bellows*, 116 Mich. 304, 74 N. W. 481. But it simply leaves the application discretionary with the trial court. *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. E. 580. And refusal in such case is not reversible error where the record shows that the cause was in fact tried on the theory disclosed by the amendment. *George v. Swafford*, 75 Iowa, 491, 39 N. W. 804. See also *San Antonio & A. P. R. Co. v. Liitke* (Tex. Civ. App.) 26 S. W. 248.

So, also, of an amendment of a petition showing that the amount originally declared on as due upon a promissory note is due on settlement, where no new evidence in chief is introduced by plaintiff and defendant is evidently not surprised. *Parsons Water Co. v. Hill*, 46 Kan. 145, 26 Pac. 412. Or an amendment whose purpose is merely to *clarify ambiguous language* of the pleading, so as to remove an objection to the introduction of evidence under it. *Ellen v. Lewison*, 88 Cal. 253, 26 Pac. 109.

Or an amendment *correcting a mistake* in defendant's name, where service was acknowledged in defendant's proper name. *Chattanooga, R. & C. R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

So, also, of a *substituted* petition, though it changes the issues, where the count therein pleading a new cause of action is withdrawn, leaving substantially the same cause of action as that set out in the original petition. *Skrable v. Pryne*, 93 Iowa, 691, 62 N. W. 21.

**Lamb v. Beaumont Temperance Hall Co.* 2 Tex. Civ. App. 289, 21 S. W. 713; *Lindsley v. Parks*, 17 Tex. Civ. App. 527, 43 S. W. 277.

**Bcham v. Ghio*, 75 Tex. 87, 12 S. W. 996; *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759.

**Vicksburg, S. & P. R. Co. v. Stocking* (Miss.) 10 So. 480; *Galveston, H. & S. A. R. Co. v. Smith*, 9 Tex. Civ. App. 450, 29 S. W. 186; *Donley v. Scanlon* (Ind.) 14 West. Rep. 520, 17 N. E. 158. And see *Sapp v. Aiken*, 68 Iowa, 699, 28 N. W. 24.

As where defendant, in an action to restrain the enforcement of a void judgment, a few minutes before the case is called for trial pleads in re-convention the original cause of action. *Gulf, C. & S. F. R. Co. v. Schneider* (Tex. Civ. App.) 28 S. W. 260.

And refusal of postponement asked by defendant because of a material amendment to plaintiff's declaration, after all evidence was in and final arguments made, is error. *Chicago & N. W. R. Co. v. Davis*, 78 Ill. App. 58. Or because of an alteration of a declaration claiming damages to one lot of land, the number of which is not given, so as to make it apply to four designated lots of land, of which defendant had no knowledge previous to the calling of the case for trial. *Central R. & Bkg. Co. v. Jackson*, 94 Ga. 640, 21 S. E. 845.

By statute.—In some states amendment of a pleading is good ground for postponement if the trial court is satisfied, by affidavit or

otherwise, as required, that the opposite party is taken by surprise and cannot be ready for trial in consequence thereof,¹ and that the purpose of the application is not delay.² But a strict compliance with those statutes is a prerequisite.³

¹*Pifer v. Stanley*, 57 Mo. App. 516; Mo. Rev. Stat. 1889, § 2128.

So in Illinois by the present statute, although prior to its passage it was conclusively presumed, under the common-law rule then prevailing, that defendant was surprised and unprepared for trial whenever the declaration was amended in any material particular, and if defendant desired he was entitled to continuance as matter of right at plaintiff's costs. *Chicago & E. I. R. Co. v. Goyette*, 32 Ill. App. 574.

A dismissal by amendment at a previous term as to one defendant, between whom and the others there is no interest, is not an amendment, within the meaning of an Alabama statute allowing a continuance as matter of right for an amendment at hearing to bill or answer, to the party against whom it is allowed. *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 So. 561.

So, an amendment describing defendant as "surviving" executor, the original complaint designating him as "executor" simply, is as to form only, and does not entitle defendant to a continuance under a Florida statute allowing a continuance for an amendment in matter of substance. *Barnes v. Scott*, 29 Fla. 285, 11 So. 48. And see note 2, preceding section.

²*Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759; Ga. Code, § 3521. And see note 4, preceding section.

³*Clause v. Bullock Printing Press Co.* 20 Ill. App. 113, Affirmed in 118 Ill. 612, 9 N. E. 201. And a dismissal of certain counts of the declaration, even though it be treated as an amendment, is insufficient without the required statutory showing. *Ibid.*

So, in Georgia, defendant's application, based on surprise at an amendment to the declaration, is properly refused where he does not state that he is less prepared for trial than he would have been if the amendment had not been made, and how, and that such surprise was not claimed for the purpose of delay, as required by the Georgia Code. *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759.

But an amendment to a pleading does not alone authorize a continuance; the applicant must show some good reason why he cannot safely proceed to trial.¹

¹*Foote v. Burlington Gaslight Co.* 103 Iowa, 576, 72 N. W. 755; *Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940; *Wolfe v. Johnson*, 152 Ill. 280, 38 N. E. 886.

He must show that he is rendered less ready for trial thereby. *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S. E. 606. And merely stating a feeling of surprise, and that he can make a complete and absolute defense to the cause of action if given reasonable opportunity to prepare, will not entitle defendant to a postponement for an amendment by

plaintiff,—especially where the amendment consisted merely of striking out one of the grounds of damages alleged and changing the gross amount claimed. *Franklin v. Krum*, 171 Ill. 378.

Surprise cannot be claimed because of an amendment, where the applicant has had *sufficient previous notice* of it and the issue raised by it to put him on inquiry and prepare to meet it.¹

¹As, where a cause of action set forth with particularity in an amended pleading was mentioned in such manner in the original as to call his attention thereto and give him notice that plaintiff relied on it. *Texas & P. R. Co. v. Neal* (Tex. Civ. App.) 33 S. W. 693. Or where the same parties had been parties to another action tried but a few months before, in which practically the same issues as those raised by the amendment were involved, and at which much of the evidence adduced had relation thereto. *Jordan v. Schuerman* (Ariz.) 53 Pac. 579.

And defendant cannot claim surprise at a trial amendment claiming damages for injuries not alleged in the original pleadings, where plaintiff's depositions, filed in court over three months, showed that damages would be claimed for those injuries. *Gulf, C. & S. F. R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 80. So of an amendment filed two days before trial, changing the date of the injuries for which damages are sought, where the date fixed by the amendment, which was the correct one, was fixed in depositions taken long before trial, in the taking of which defendant participated. *Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

So, service of a copy of an amendment on him ten months previous to the trial will overcome a claim of surprise, although the original was not filed until three days before trial. *Southern Bell Teleph. & Teleg. Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202.

But plaintiff in certiorari should be granted a continuance where, after admitting the truth of the answer, it has been amended without notice to him. *Phillips v. Atlanta*, 79 Ga. 510, 3 S. E. 431. And in *Sapp v. Aiken*, 68 Iowa, 699, 28 N. W. 24, refusal on the ground that the party filing the amendment had notified his adversary of the substance thereof in time to prepare to meet it was held error, because it was necessary to prepare to meet only those issues raised by the pleadings.

For a discussion of other matter arising at trial operating to surprise a party, entitling him to a continuance, see *infra*, § 12.

Failure to ask for a postponement on the court's allowing an amendment to be filed instanter, and proceeding with the trial, will prevent the subsequent assignment of such action as error.¹

¹*Manners v. Fraser*, 6 Colo. App. 21, 39 Pac. 889; *Knefel v. Flanner*, 166 Ill. 147, 46 N. E. 762; *Taylor v. Cox*, 32 W. Va. 148, 9 S. E. 70.

And a defendant who, instead of asking a postponement because he was not given notice of the filing of an amendment, excepts to the introduction of any evidence thereunder, and then withdraws from the case and refuses to file an answer on the ground that he is not ready for trial.

cannot appeal for errors alleged to have been committed at trial. *Baker v. Kansas City, St. J. & C. B. R. Co.* 107 Mo. 230, 17 S. W. 816.

To allow defendant time to rejoin.—A defendant whose motion to require plaintiff to make his reply more specific is overruled on the next to the last day of the term is entitled to time to rejoin and to take proof in support of his defense.¹

¹*Moreland v. Citizens' Sav. Bank*, 16 Ky. L. Rep. 860, 30 S. W. 19.

To make up issues as to party appearing after issues joined.—A defendant as to whom the issues are joined and the cause set for trial cannot demand a continuance to make up issues as to another defendant not served, who voluntarily appears.¹

¹*National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35.

Especially where the claims of the new parties, who are brought in while the trial is in progress, are undisputed. *Burns v. Beek & G. Hardware Co.* 83 Ga. 471, 10 S. E. 121.

11. — want of preparation.

A party who has been diligent in his efforts to be ready for trial but is defeated by circumstances beyond his control is, if no unreasonable delay has occurred, entitled to a reasonable opportunity for presenting his case, and postponement should be granted if necessary for that purpose;¹ and if he is not ready for trial when his case is called he should, in order to save his rights, move to postpone, stating fully his grounds therefor.² But in a case of long pendency, an applicant, though it is his first application, is held to the most rigid requirement of the statutes.³

¹*Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817; *E. F. Kirwan Mfg. Co. v. Truxton* (Del.) 42 Atl. 988. As, when his failure to be ready is due to the unexpected continuance of another cause set for trial the same day, the outcome of which, it was anticipated, would determine his own cause, although he is to some extent negligent. *Re Davis*, 15 Mont. 347, 39 Pac. 292. But plaintiff's application for time to file an amended complaint, and to procure evidence rendered necessary by the amendment, is properly denied, where the cause has already been twice tried and the court is not informed of the nature of the desired amendments or that plaintiff is unable to establish those averments without additional evidence. *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557.

²*Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887.

³*Watson v. Blymer Mfg. Co.* 66 Tex. 558, 2 S. W. 353.

A party whose *counsel*, though diligent, is, for reasons beyond his control, *unprepared* for trial, is entitled to postponement.¹ Otherwise, however, of a simple case requiring but inconsiderable time for preparation.²

¹*Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636 (sudden illness of client).

²*Glaeser v. St. Paul*, 67 Minn. 368, 69 N. W. 1101.

But unpreparedness of counsel because of his being *recently retained* will not authorize postponement if the client, though having sufficient time and reasonable opportunity, has not been diligent in securing counsel.¹

¹Denial of the application is not an abuse of discretion in such a case. *Gunn v. Gunn*, 95 Ga. 439, 22 S. E. 552; *Texas, S. F. & N. R. Co. v. Saxton*, 7 N. M. 302, 34 Pac. 532. And especially where the hour of trial has been already reset to an hour fixed by the applicant himself. *Barton v. Mahaska County Dist. Ct.* 90 Iowa, 742, 57 N. W. 611. Or there is no showing why former counsel does not appear. *Maloney v. Traverse*, 87 Iowa, 306, 54 N. W. 155.

But a party whose counsel informs him on the day of the application that he cannot try the case, and who immediately employs new counsel, is entitled to postponement,—especially where it appears that he has a meritorious case which would be materially prejudiced by being forced to immediate trial. *Allen v. Pollad*, 15 Ky. L. Rep. 52, 22 S. W. 436.

12. — surprise at trial.

Failure of evidence, due to the absence of plaintiff's only witness by whom he could defeat a defense set up the day before the application to postpone was made, and which took him by surprise, is ground for postponement.¹

¹*Alt v. Groselose*, 61 Mo. App. 409 (error to refuse).

So, too, where the applicant has been, honestly and without indiscretion on his part, *misled* by a witness to rely on his testimony and is surprised by the witness's testifying contrary to what was expected;¹ but the testimony must be material.²

¹*Maynard v. Cleveland*, 76 Ga. 52. And it is error of law to hold that the applicant's showing for a continuance, though otherwise satisfactory, is met and answered by the mere fact that the witness is called by his adversary, and not by himself. *Ibid.*

But a claim that the adverse party testified to a state of facts different from that which it was supposed he would testify to is insufficient. *Butt v. Carson*, 5 Okla. 160, 48 Pac. 182.

²*Dempsey v. Taylor*, 4 Tex. Civ. App. 126, 23 S. W. 220..

Surprise predicated on the *admission of evidence* is good ground for postponement when it is irrelevant to any issue of law or fact joined or tendered by the party offering it;¹ or contrary to the other party's understanding of a ruling on a former motion, by which he understood it was to be excluded.² But not when the applicant is fairly apprised by his adversary's pleadings of the character of the evidence which he may expect will be offered, and shows no reason for being unprepared to meet it;³ nor where the evidence admitted requires no new evidence to meet it;⁴ and nothing but delay would be accomplished by the postponement.

¹*Garrett v. Carlton*, 65 Miss. 188, 3 So. 376; *Jourdan v. Healey*, 46 N. Y. S. R. 198, 19 N. Y. Supp. 240.

²*Colorado Midland R. Co. v. Bowles*, 14 Colo. 85, 23 Pac. 467.

³*Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216. Especially where there is no showing that the testimony is false or can be rebutted. *Gidionsen v. Union Depot R. Co.* 129 Mo. 392, 31 S. W. 800.

"It is a condition precedent to the relief sought, however, that the applicant should himself be blameless." *Gidionsen v. Union Depot R. Co.* 129 Mo. 392, 31 S. W. 800.

⁴Thus, a supplemental account filed by executors in a proceeding for distribution, before the jury is impaneled, the items of which are merely a continuation of those in the original account. *Shiner v. Shiner*, 14 Tex. Civ. App. 489, 40 S. W. 439.

The admission of incompetent evidence and its subsequent withdrawal before argument furnishes in itself no ground for postponement.¹

¹Especially where the party asking its withdrawal, who is also the applicant for the postponement, is not prejudiced by it. *Rathgebe v. Pennsylvania R. Co.* 179 Pa. 31, 36 Atl. 160.

The *exclusion of evidence* because incompetent does not entitle to a postponement on the ground of surprise.¹ Otherwise, however, where it is excluded on objection contrary to agreement of counsel.² But the application is discretionary with the trial court.³

¹*French v. Groesbeck* (Tex. Civ. App.) 27 S. W. 43.

Otherwise, when the incompetency results from a defect which can be

cured without materially delaying the trial. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53. Though granting the application is not sufficient to require a reversal of a judgment rendered at a subsequent term, on full trial on the merits. *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. W. 148.

¹*Cherokee & P. Coal & Min. Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178. See also *Texas & P. R. Co. v. Boggs* (Tex. Civ. App.) 30 S. W. 1089.

²*French v. Groesbeck* (Tex. Civ. App.) 27 S. W. 43; *Wadsworth Poor School v. Orr*, 33 S. C. 273, 11 S. E. 830 (refusing to review the exercise of that discretion).

A party claiming to be surprised must move for a continuance¹ at the earliest practicable moment;² and failure to do so is to waive the surprise.³

¹*Collins v. Valleau*, 79 Iowa, 626, 43 N. W. 284, 44 N. W. 904.

²*McLear v. Hapgood*, 85 Cal. 557, 24 Pac. 788.

³*Dueber Watch-Case Mfg. Co. v. Lapp*, 35 Ill. App. 372.

13. — absence of the party.

Absence of the party himself from the trial, without good cause shown, is not ground for postponement as matter of right;¹ and it is not enough that he remains away in reliance upon his attorney's advice that the case would not be reached,² though he may do so upon such a statement by the court.³

¹*Tucker v. Garner*, 25 Kan. 454; *Pardridge v. Wing*, 75 Ill. 236; *Culley v. Walkeen*, 80 Mich. 443, 45 N. W. 368; *Allis v. Meadow Spring Distilling Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300; *Camp v. Morgan*, 81 Ga. 740, 8 S. E. 422; *Lehman v. Hudmon*, 85 Ala. 135, 4 So. 741; *National Exch. Bank v. Walker*, 80 Ga. 281, 4 S. E. 763; *Evans v. Marden*, 154 Ill. 443, 40 N. E. 446; *West v. Hennessey*, 63 Minn. 378, 65 N. W. 639.

Thus, absence of defendant's law agent, who prepares cases for trial, secures the attendance of witnesses, and assists counsel at trial, and has all the evidence connected with the case, will not authorize postponement, where it does not appear how or why counsel cannot safely go to trial in his absence. *East Tennessee, V. & G. R. Co. v. Flectwood*, 90 Ga. 23, 15 S. E. 778. Especially where another such agent is present who is well acquainted with the facts. *Gulf, C. & S. F. R. Co. v. Jagoe* (Tex. Civ. App.) 32 S. W. 717.

But an action before a justice in which defendant has been arrested on civil process should be postponed on showing that defendant is in attendance on the circuit court as juror. *Brower v. Tatro*, 115 Mich. 368, 73 N. W. 421.

But the motion must be supported at least by proof that he is unable to attend, and that his presence is necessary to a fair trial, either as an in-

terested party (*Telford v. Brinkerhoff*, 45 Ill. App. 586; *Paulucci v. Verity*, 1 Kan. App. 121, 40 Pac. 927), or as an indispensable witness for himself, and that it has been impossible to secure his deposition. *Hurck v. St. Louis Exposition & Music Hall Asso.* 28 Mo. App. 629.

A mere allegation that the party's presence was necessary for conference with his counsel during the trial,—*held*, not enough to make it error to refuse. *Pate v. Tait*, 72 Ind. 450. Or that his testimony is necessary to create a preponderance in his favor, one postponement for the same reason having already been had. *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027.

But *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620, holds it unnecessary to state the reason why the party's presence is desired.

¹*Brock v. South & North Ala. R. Co.* 65 Ala. 79; *Brandt v. McDowell*, 52 Iowa, 230, 2 N. W. 1100.

²As, a statement by the court on the day set for trial that the case would not be reached, but if it was, it would be continued because of the illness of defendant's counsel. *Light v. Richardson* (Cal.) 31 Pac. 1123.

Otherwise, of a statement by a justice made out of court that a case will be continued to a term subsequent to that to which it is returnable, and of which the adverse party has no knowledge until he comes to the trial. *Watkins v. Ellis*, 105 Ga. 796, 32 S. E. 131. And in *Holden v. McCabe*, 21 Pa. Co. Ct. 41, a continuance granted by a justice, who met the parties on the street and told them he could not hear the case till 9 o'clock the next morning, is held invalid, and does not bind defendant to appear at that time.

Providential or unavoidable causes, or causes to which neither the absentee nor his counsel have contributed, may, however, entitle the applicant to a postponement.¹

¹As, where plaintiff's failure to attend was due to the miscarriage of a letter written by her attorney. *Helm v. Voils*, 58 Kan. 816, 49 Pac. 662.

And counsel should be allowed time to prepare a formal application where he states that he has written his client, who lives at a distance, of the time of trial, and that his absence is undoubtedly due to failure to receive the letter. *Mayton v. Guild* (Tex. Civ. App.) 29 S. W. 218.

Otherwise, however, when the only evidence to support the application is a telegram from the absent party that he is "detained providentially by sickness." *McElveen Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428. Or a telegram from his copartners that he was at a place from which he could not reach the place of trial until after the time at which it was to be called, and diligence demanded that his deposition should have been taken. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565.

Illness of a party, necessitating his absence from the trial, may be ground for a postponement;¹ but a refusal on an insufficient showing that it exists is not error.²

¹*Post v. Cecil*, 11 Ind. App. 362, 39 N. E. 222; *Elliott v. Field*, 21 Colo.

378, 41 Pac. 504; *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636; *Mathew v. Willoughby*, 85 Ga. 289, 11 S. E. 620; *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723. Absence on account of sudden illness has been held to make it error to refuse. *Douglass v. Blakemore*, 12 Heisk. 564.

Otherwise, where both parties announce "ready" when the case is called in its order, two days before that set for trial, and the party is no worse on the day of trial than she was on the day set for the trial. *Hinkle v. Story*, 96 Ga. 776, 22 S. E. 333. Or where, further than his desire to attend, there is no showing that attendance of the party who is a nonresident is necessary, either as a party or a witness. *Paulucci v. Verity*, 1 Kan. App. 121, 40 Pac. 927.

For other illustrations of refusal held proper, see *Schlesinger v. Nunan*, 26 Ill. App. 525; *Duggar v. Lackey*, 85 Ga. 631, 11 S. E. 1025; *Worshman v. McLeod* (Miss.) 11 So. 107; *Rubens v. Mead* (Cal.) 53 Pac. 432.

¹*Smith v. Smith*, 132 Mo. 681, 34 S. W. 471; *McGrath v. Tallent*, 7 Utah, 256, 26 Pac. 574.

Thus, where illness was shown only by physician's certificate, without affidavit. *Schnell v. Rothbath*, 71 Ill. 83; *Waarich v. Winter*, 33 Ill. App. 36; *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159. Or where the certificate does not state that the one certifying is a physician, and no evidence is offered that he is such, and no other evidence of the illness is offered, though there is a subsequent offer to show that the one certifying is a physician. *Gainsley v. Gainsley* (Cal.) 44 Pac. 456.

*Illness in party's family may be ground for postponement.*¹

¹As, where the applicant's child is dangerously ill. *Peebles v. Ralls*, 1 Litt. (Ky.) 25; *Rose v. Stuyvesant*, 8 Johns. 426.

But not where the illness is not satisfactorily shown to be such at the time of the application as to necessitate his remaining at home. *Matthews v. Bates*, 93 Ga. 317, 20 S. E. 320.

Physical inability of a party to attend court, due to personal injuries, etc., is not ground for postponement unless his presence is indispensable to a fair trial.¹

¹*Townsend v. Rhea*, 18 Ky. L. Rep. 901, 38 S. W. 865; *Beard v. Mackey*, 51 Kan. 131, 32 Pac. 921.

Death of a party, necessitating a revivor, is good ground for postponement.¹

¹*Grove v. Grove*, 13 Ky. L. Rep. 807, 18 S. W. 456.

And *delay of executor in applying*, under the New York Code of Civil Procedure, for continuance of an action in which testator was sole plaintiff, and which survived, does not prevent granting the motion,—especially in the absence of any proof by defendant that his defense has been prejudiced thereby. *Van Brocklin v. Van Brocklin*, 17 App. Div. 226, 45 N. Y. Supp. 541.

The North Carolina supreme court will not review an order directing a postponement, upon suggestion of the death of a party, although not a necessary party. *Jaffray v. Bear*, 98 N. C. 58, 3 S. E. 914.

The Maryland statute providing that an action to recover land in which an infant is substituted for a deceased party shall be continued until the infant arrives at age is in force, and is consistent with the Maryland Code. *Tise v. Shaw*, 68 Md. 1, 11 Atl. 363, and 582.

14. — absence of counsel.

Absence of attorney or counsel, without good cause shown, is not ground of postponement as matter of right,¹—especially if the case presents no unusual or extraordinary features and the party is represented at the trial by other competent counsel.²

¹*Whitehall v. Lane*, 61 Ind. 93; *Kern Valley Bank v. Chester*, 55 Cal. 49.

Even though he be new counsel called in for the first time. *Darley v. Thomas*, 41 Ga. 524.

The motion is one to be disposed of in the sound discretion of the court, and in view of the circumstances then made to appear. *Baumberger v. Arff*, 96 Cal. 261. See also *Corbett v. National Bank of Commerce*, 44 Neb. 230, 62 N. W. 445; *Boyd v. Leith* (Tex. Civ. App.) 50 S. W. 618; *Ostrom v. McCloskey* (Tex. Civ. App.) 50 S. W. 1068.

²*Adamek v. Plano Mfg. Co.* 64 Minn. 304, 66 N. W. 981; *Gould v. Elgin City Bkg. Co.* 136 Ill. 60, 26 N. E. 497, Reversing on Other Grounds, 36 Ill. App. 390.

And the cause has been regularly set for trial on the calendar some days previously. *Zelinsky v. Price*, 8 Wash. 256, 36 Pac. 28. And it is not shown that counsel present needs the assistance of his absent associate. *Stringam v. Parker*, 159 Ill. 304, 42 N. E. 794.

Absence of chief counsel may make it matter of right if the dependent circumstances and his peculiar relation to the cause demand it.¹ Otherwise, however, if able associate counsel are present, and no real injustice or prejudice will result from a refusal.²

¹So expressly provided by statute in Georgia.

And *Green v. Culver*, 19 Ky. L. Rep. 186, 39 S. W. 426, holds a mere showing of absence of chief counsel sufficient. But *St. Louis, C. G. & Ft. S. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49, holds that absence of senior counsel, who are said to be familiar with the facts and in possession of most of the evidence, which is documentary, will not support an application where no excuse for their absence is given.

²*Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906; *Johnson v. Dean*, 48 La. Ann. 100, 18 So. 902.

Illness may make it matter of right, where it is impracticable, with due diligence, to secure other counsel in time.¹ So also where counsel

was kept away by illness in his family.² But an application is properly refused on an insufficient showing of the illness.³

¹*Rice v. Melendy*, 36 Iowa, 166.

"If there is no sufficient reason to induce the belief that the alleged ground of the motion is feigned, a continuance should be granted, rather than to seriously imperil the just determination of the cause by refusing it."
Myers v. Trice, 86 Va. 835, 11 S. W. 428.

And refusal is reversible error, where the court allowed his discretion to be controlled by his custom to require litigants to employ other counsel, when their counsel engaged are too ill to attend, and the case has been long on the docket. *Varn v. Green*, 50 S. C. 403, 27 S. E. 862.

But not where it does not appear that his client's case is prejudiced thereby. *Tipton County Comrs. v. Brown*, 4 Ind. App. 288, 30 N. E. 925. Nor where the case is a simple case which anyone can try without preparation, and the applicant is himself a lawyer. *Jarvis v. Shacklock*, 60 Ill. 378; *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292. And it does not appear when, if ever, counsel employed would be able to try the case, and there had been ample time in which to have engaged other counsel,—another well-known and able attorney presenting the motion. *Condon v. Brockway*, 50 Ill. App. 625.

Nor is it error to refuse a postponement, asked because of the inflamed condition of counsel's eyes, where immediately after the refusal he proceeded to participate and conduct the trial in person. *Haues v. Clark*, 84 Cal. 272, 24 Pac. 118. Or because of the illness of leading counsel, where his associate was present and participated in the trial. *Waxelbaum v. Matthews*, 96 Ga. 774, 22 S. E. 380; *Wilson v. Thorn*, 11 Ky. L. Rep. 945, 13 S. W. 365; *McCready v. Lindenborn*, 37 App. Div. 425, 56 N. Y. Supp. 54.

And there is no abuse of discretion in refusing a second continuance because of counsel's illness where there has been no diligence to procure other counsel or to prepare for trial since the first continuance. *Little v. Zeimer*, 62 Ill. App. 170.

²*Thompson v. Thornton*, 41 Cal. 626.

Setting aside a continuance granted for illness in counsel's family is not prejudicial error where ample time was afterwards given to prepare for the trial, and the counsel appears and assists therein. *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907; 134 Ind. 606, 34 N. E. 502.

³Thus, where no evidence of illness is presented other than the mere oral statement of the party. *Hunt v. O'Brien*, 59 Ill. App. 321. Or the unverified certificate of a physician. *Randall v. United Life & Acci. Ins. Asso.* 39 N. Y. S. R. 155, 14 N. Y. Supp. 631. Or simply telegram. *Cabell v. Holloway*, 10 Tex. Civ. App. 307, 31 S. W. 201.

Death of counsel resulting from sickness of such a nature and duration that reliance should not have been placed upon his ability to attend the trial will not demand a continuance.¹

¹*Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571.

In the absence of any regulation to the contrary, *actual engagement* of counsel in the trial or argument of a cause in another court at the same time is good ground for claiming a postponement,¹ but an engagement in a trial in an inferior court is not;² and, after other previous postponements allowed on this ground,³ or where the applicant is represented by other apparently competent counsel,⁴ the application is addressed to the discretion of the court. But absence on other engagements is not a sufficient ground.⁵

¹*Hill v. Clark*, 51 Ga. 122, holding it error to refuse; *Gerlach v. Engelhofer*, 7 Phila. 241; *Watkins v. Ahrens & O. Mfg. Co.* 18 Ky. L. Rep. 926, 38 S. W. 868.

In the New York city circuit the rule is that "in a case upon the day calendar for trial, where it shall appear to the court by affidavit that counsel who is to try the case is to argue a cause upon the day calendar of the Supreme Court of the United States, or upon the day calendar of the court of appeals of the state of New York, or upon the day calendar of any appellate division of the supreme court, or is actually engaged in the trial of a case in a court of record in the city of New York, or in the city of Brooklyn, the case shall be passed for the day, or until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one." N. Y. Court Rules 1896, App. Div. Rules, Rule V., Hun's ed. 325.

By § 1377 of the Greater New York charter this rule is made applicable to municipal courts, and it is reversible error to refuse to postpone a cause pending in the municipal court where the affidavit is in the form contemplated by this rule and shows that counsel is actually engaged in the trial of a designated case, in a specified court. *Marsh v. Nassau Show-Case Co.* 56 N. Y. Supp. 1083. And the error is not cured by opening the default upon a motion made and heard upon conflicting affidavits, with the imposition of terms upon the defendant. *Ibid.*

So, also, under the Pennsylvania supreme court rule 41, refusing to recognize counsel's engagements in lower courts is ground for postponing a cause in the supreme court, except when the trial was actually begun the week before the supreme court case was set for argument. *Peterson v. Atlantic City R. Co.* 177 Pa. 335, 34 L. R. A. 593, 35 Atl. 638.

And the judgment of the lower court against the party whose counsel is, to the court's knowledge, at the time present in the supreme court, pursuant to this rule, will not be permitted to stand. *Ibid.*

An inferior court should suspend proceedings in a case, though then on trial, to allow counsel therein to try cases called in a superior court, after the adoption by both courts of mutual rules establishing such comity between them as to enable counsel to represent their clients in cases pending in each, and the superior court has refused to postpone because of counsel's attendance upon the inferior court. *Bibb Land-Lumber Co. v. Lima Mach. Works*, 98 Ga. 279, 25 S. E. 445.

See, however, *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220, holding that counsel's absence without leave, one attending the supreme court

in a case from another circuit, and the other attending a Federal court, was not a legal showing; and *Evansville & I. R. Co. v. Hawkins*, 111 Ind. 549, 13 N. E. 63, holding that only in cases presenting unusual features can postponement because counsel are professionally engaged be claimed as a matter of right.

¹Engagement before a justice of the peace. *Packer v. Wetherell*, 44 Ill. App. 95.

²*Brock v. South & North Ala. R. Co.* 65 Ala. 79; *Northwestern Ben. Mut. Aid Asso. v. Primm*, 124 Ill. 100, 16 N. E. 98.

³*Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639. And it is not shown that the counsel present were not conversant with the facts, nor any other reason given showing a necessity for the presence of the absent counsel. *Watkins v. Atwell* (Tex. Civ. App.) 45 S. W. 404, citing *Western U. Teleg. Co. v. Brooks*, 78 Tex. 332, 14 S. W. 699; District Court Rule 49, 84 Tex. 715.

⁴*Jackson v. Wakeman*, 2 Cow. 578.

Actual attendance upon a session of the legislature, of which counsel is a member, at the time a cause is called for trial, demands its postponement as matter of right, upon a proper showing thereof.¹

¹So by statute, in Illinois. *Harrigan v. Turner*, 53 Ill. App. 292; *Ward v. Jerseyville*, 158 Ill. 234, 41 N. E. 736. And in Cal. Code Civ. Proc. § 595.

But it must be shown that he was actually employed before the commencement of the session. *Chicago Public Stock Exchange v. McClaughry*, 50 Ill. App. 358, 148 Ill. 372, 36 N. E. 88. And the applicant must show that he expects to have the absent counsel present at the next term. *Lamar v. McDaniel*, 78 Ga. 547.

15. — absence of witness; neglect to subpoena.

Absence of a witness who, although a resident within the jurisdiction of the court, has not been subpoenaed, without good cause shown for the failure to subpoena, is no ground for postponement.¹ Nor does absence of a witness whom the applicant omitted to subpoena, though in reliance on his promise to attend, entitle to a postponement.² But the application is discretionary with the trial court,³ and its refusal is not error unless that discretion is abused.⁴

¹*Bates v. Messer*, 76 Ga. 696; *People ex rel. Cacheaux v. Hanson*, 150 Ill. 122, 127, 36 N. E. 998; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Rose v. Hall*, 19 Ky. L. Rep. 163, 39 S. W. 413; *Blair v. Chicago & A. R. Co.* 89 Mo. 334, 1 S. W. 367; *Keller v. Feldman*, 2 Misc. 179, 49 N. Y. S. R. 718, 23 N. Y. Civ. Proc. Rep. 37, 29 Abb. N. C. 426, 21 N. Y. Supp. 581; *Pcole v. Jackson*, 66 Tex. 380, 1 S. W. 75; *House v. Cessna*, 6 Tex. Civ. App. 7, 24 S. W. 962; *Texas & P. R. Co. v. Turner* (Tex.

Civ. App.) 37 S. W. 643; *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25; *Kearney Stone Works v. McPherson* (Wyo.) 38 Pac. 920.

So, even though the applicant did not know his case would be for trial until the day before its commencement, where there is no claim that his counsel were absent during the previous days of the term. *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058.

So, also, of omission to notify witnesses of the day of trial as required by a rule of court, although they have been duly subpœnaed. *Wilson v. Burr*, 97 Ga. 256, 22 S. E. 991.

So, where the failure to procure the attendance of an employee of the applicant is due to his absence from duty on leave. *East Line & R. River R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298. Or his attendance is promised by the applicant, but the failure is unexplained, though counsel is not lacking in diligence. *Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082. Or the witness was not subpœnaed because he was the applicant's attorney and was expected to be present, if needed. *Zabel v. Nyenhuis*, 83 Iowa, 756, 49 N. W. 999.

And so, even though the witness has left the country, where he ought to have been subpœnaed before his departure. *San Antonio & A. P. R. Co. v. Bowles* (Tex. Civ. App.) 30 S. W. 89.

*Common practice. *Freeland v. Howell*, Anthon, N. P. 272; *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52; *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. 682; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, Affirming 53 Neb. 481, 73 N. W. 942; *Campbell v. McCoy*, 3 Tex. Civ. App. 298; *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

Otherwise of a foreign witness who could not be subpœnaed because beyond the jurisdiction, but whose promise was properly relied upon. *Cahill v. Hilton*, 31 Hun, 114. Even though he be a coparty, and it is shown that he is the only witness to the facts desired to be proved. *Johnson v. Mills*, 31 Neb. 524, 48 N. W. 266; *Johnson v. Peter*, 48 N. W. 267, sub nom. *McCall v. Peter*, 31 Neb. 527.

But *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983, upholds a refusal where witness left the jurisdiction, promising to return for the trial, when the case had been ready for trial nearly a year, and he did not appear to be the sole witness.

**Farmers' & Drovers' Bank v. Williamson*, 61 Mo. 259; *Missouri P. R. Co. v. Haynes*, 1 Kan. App. 586; *Clark v. Dekker*, 43 Kan. 692, 23 Pac. 956; *Atkins v. Field*, 89 Me. 281, 36 Atl. 375; *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742; *State v. Howe*, 27 Or. 138, 44 Pac. 672; *Foertsch v. Germueller*, 9 App. D. C. 351.

So in a Federal court, though sitting in a state under the statutes of which it is not discretionary, since the mode of summoning witnesses and taking testimony in Federal courts is regulated by United States statutes, and the act conforming the practice in Federal courts to that of the state courts does not apply. *Texas & P. R. Co. v. Nelson*, 2 U. S. App. 213, 50 Fed. Rep. 814, 1 C. C. A. 688.

**Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Hamilton v. Moore*, 94 Ga. 707, 19 S. E. 993.

Thus, refusal is no abuse of discretion, where the witness is present and testifies at the trial. *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483; *Hartford F. Ins. Co. v. Corey*, 53 Neb. 209, 73 N. W. 674; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, 53 Neb. 481, 73 N. W. 942. Or where the witness, who had been served with a subpoena *duces tecum*, subsequently appears in court and testifies, and all the papers and records he is required to bring appear in the records of the case and are treated as though duly offered in evidence. *Aldridge v. Elerick*, 1 Kan. App. 306, 41 Pac. 199. Or where his deposition had been taken in anticipation of his removal from the state. *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

And an application to procure a witness discovered pending the trial may be refused where neither party nor counsel knows, except by hearsay, that he can testify to any material fact. *Central R. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757.

Otherwise where absent and material witnesses were in necessary attendance upon a United States court, and sufficient diligence is shown. *Adams v. Grand Island & W. C. R. Co.* 10 S. Dak. 239, 72 N. W. 577.

Or where the refusal of a sufficient application was based on an erroneous conception of the law, in consequence of which the party suffered serious disadvantage. *Maynard v. Cleveland*, 76 Ga. 52.

But withdrawing an answer and demurring to the petition after a refusal to postpone on the ground of absent witnesses waives any error in the refusal. *Day v. Mooney*, 3 Okla. 608, 41 Pac. 142.

16. — or to take deposition.

Nor does absence of a transient witness whom the applicant had adequate opportunity to examine before the trial.¹

Ide v. Gilbert, 62 Ill. App. 524; *McKinsey v. McKee*, 109 Ind. 209, 9 N. E. 771; *Campbell v. Blanke*, 13 Kan. 62; *Holmes v. Corbin*, 50 Minn. 209, 52 N. W. 531; *Harris v. Powell*, 56 Mo. App. 24; *Kansas City, W. & N. R. Co. v. Conlee*, 43 Neb. 121, 61 N. W. 111; *McKay v. Marine Ins. Co.* 2 Cai. 384; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924; *Smith v. Cunningham*, 9 Phila. 96; *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Galveston, H. & S. A. R. Co. v. Henning* (Tex. Civ. App.) 39 S. W. 302, Affirmed in 90 Tex. 656, 40 S. W. 392; *Wytheville Ins. & Bkg. Co. v. Teiger*, 90 Va. 277, 18 S. E. 195; *Juch v. Hanna*, 11 Wash. 676, 40 Pac. 341.

Inconvenience and embarrassment to a railroad company caused by being compelled to bring to the trial as witnesses its train masters and train dispatchers will not justify a continuance where their testimony might have been taken by deposition. *Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035.

And a third application is properly refused when made on account of the absence of a witness who was also absent at the preceding term, and in the meantime no diligence was used to secure his evidence. *Ft. Worth & D. C. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335.

The sufficiency of the excuse for failure to obtain the deposition of a nonresident witness before the trial, and the degree of diligence exercised in that respect, are questions for the trial court.¹

¹*Allen v. Brown*, 72 Minn. 459, 75 N. W. 385.

17. — absence of foreign witness.

Absence of a foreign witness is ground for postponement if there were circumstances justifying the reliance of the applicant on his voluntary attendance.¹ Otherwise not.²

¹*Cahill v. Hilton*, 31 Hun, 114 (error to refuse); *Mowat v. Brown*, 17 Fed. Rep. 718; *Brown v. State*, 65 Ga. 332.

²*Campbell v. Blanke*, 13 Kan. 62, and *Gill v. Buckingham*, 7 Kan. App. 227, 52 Pac. 897 (witness residing in another county). See also *Drumm-Flato Commission Co. v. Byers*, 7 Kan. App. 812, 53 Pac. 1131; *Rome R. Co. v. Barnett*, 94 Ga. 446, 20 S. E. 355.

As where the witness is applicant's servant and the court has no power to compel his attendance because of his nonresidence. *Fire Asso. of Phila. v. Hogwood*, 82 Va. 342.

The mere fact of *nonresidence* of an absent witness, however, will not justify the assumption that ordinary diligence could not have secured the testimony, but the applicant must show that, in the exercise of due diligence, he was unable to do so.¹

¹*Benoit v. Revoir*, 8 N. Dak. 226, 77 N. W. 605.

And that the applicant was induced (it not being stated by whom) to believe that the witness would return to the county in which the action was pending in time to finish a deposition already begun will not excuse the applicant's failure to take his deposition in the county in which the witness lived,—especially where he knew that a speedy trial would be insisted upon. *Leiper v. Earthman* (Tenn. Ch.) 46 S. W. 321.

Otherwise, where the witness is sick at the time of trial and there has been no laches in taking her depositions. *Crittenden v. Coleman*, 74 Ga. 803.

Or where the importance of the witness was ascertained too recently before trial to have taken his deposition, and the postponement asked was so short as not to work injury to the adverse party. *Perkins v. Whitney*, 34 N. Y. S. R. 951, 12 N. Y. Supp. 184.

18. — no opportunity to procure.

Absence of witness who unexpectedly went abroad, so that there was no opportunity to subpoena him, is ground for postponement.¹ So of the unexpected death of a subpoenaed witness too shortly before the trial to allow of getting other evidence.²

¹*Nixen v. Hallett*, 2 Johns. Cas. 218.

Or where he left the state after the case was placed on the calendar, but before the calendar was published, a rule of court requiring subpoenaing of witnesses as soon as the calendar is published and announced by the court. *Miller v. Hickman* (Del.) 40 Atl. 192.

Otherwise, where witness, before leaving, told applicant of his intention to leave, and that another could give the desired evidence, although the latter fails to testify as expected. *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829.

²*Long v. McDonald*, 39 Ga. 186 (judgment reversed for refusing postponement).

19. — absence of documentary evidence.

Nor does documentary evidence which the applicant has omitted to procure, though he has had ample time and opportunity,¹ or which in substance is supplied by other evidence admitted,² entitle to a postponement. Otherwise, of the absence of documentary evidence, the existence of which was too recently discovered to enable the party to have produced it.³

¹*Emmons v. Pidcock*, 93 Va. 146, 24 S. E. 905; *Huttig Sash & Door Co. v. Montgomery*, 57 Mo. App. 91; *Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1130; *Brackett v. Carrico*, 18 Ky. L. Rep. 874, 38 S. W. 694; *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125; *Stewart v. Sutherland*, 93 Cal. 270, 28 Pac. 947.

Otherwise, of necessary evidence whose nonproduction is due wholly to causes not chargeable to the applicant; as, failure of a surveyor to report his survey of the land in suit, as ordered by the court, though at the adverse party's request. *Green v. Culver*, 19 Ky. L. Rep. 186, 39 S. W. 426. So, even though the failure is due to the applicant's refusal to advance money to pay for the survey, where he expresses his willingness to pay if so ordered by the court. *Schamberg v. Leslie*, 19 Ky. L. Rep. 599, 41 S. W. 265.

²*Prior v. North Texas Nat. Bank* (Tex. Civ. App.) 29 S. W. 84.

³*Cahill v. Dawson*, 1 Fost. & F. 291; *Higginson v. Bank of England*, 1 Fost. & F. 450.

Otherwise, where with the slightest diligence the evidence might have been procured. *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125.

20. — discovery and production.

A party who, by interrogatories filed and commission attached, on proper notice, seeks discovery from an adversary, which is material and within the terms of the statute, is entitled to a postponement on failure of his adversary to answer the interrogatories.¹ So, too, on notice to produce papers, the court may, on holding it bad in part as being too vague in description, give time to answer the part held

good.² But a trial should not be delayed for a party demanding the production of papers who has been negligent in making the demand, and offers no satisfactory excuse therefor, though it could lawfully have been made earlier.³

¹*Brown v. Mercer*, 82 Ga. 550, 9 S. E. 471.

²*Parish v. Weed Sewing Mach. Co.* 79 Ga. 682, 7 S. E. 138.

³*Barth v. Green*, 78 Tex. 678, 15 S. W. 112.

21. — diligence in procuring evidence.

Generally.—There is no fixed standard of diligence. It depends upon the usual course of procedure and course of business, the situation or location of the absent witness and the facilities which may be employed to procure his attendance, and all the facts and circumstances of the case.¹ Generally, however, whether at common law or under the statutes, the applicant must show that, although diligent, he has been unable to learn of the witness and his materiality,² or his whereabouts,³ but that if given time they can be discovered;⁴ that he has been unable to secure the attendance of the witness;⁵ that the witness's absence is not of his procurement, or with his consent or connivance, directly or indirectly;⁶ and that vexation or delay is not the purpose of the application.⁷

¹*Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co.* 84 Wis. 262, 54 N. W. 108.

The acts constituting the alleged diligence must be proved by one having personal knowledge thereof. *Nix v. Pope* (Tex. Civ. App.) 37 S. W. 617.

But the oral statement of counsel that two witnesses, not named, were sick, is insufficient, no claim being made that they were material, and no legal proof of either fact presented on which the court could act. *Spanghel v. Spanghel*, 39 App. Div. 5, 57 N. Y. Supp. 7.

²*Simmons v. Louisville & N. R. Co.* 13 Ky. L. Rep. 941, 18 S. W. 1024; *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

³*Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035.

And of whom, when, where, and how inquiries in regard to procuring the testimony were made. *Clouston v. Gray*, 49 Kan. 31, 28 Pac. 983. And for illustrations of insufficient showing, see: *Schultz v. Moon*, 33 Mo. App. 329; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Moffitt v. Chicago Chronicle Co.* 107 Iowa, 407, 78 N. W. 45; *Watson v. Blymer Mfg. Co.* 66 Tex. 558, 2 S. W. 353; *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997.

⁴*Heitschmidt v. McAlpine*, 59 Ill. App. 231.

⁵*Jones v. Rome Grocery Co.* 99 Ga. 103, 24 S. E. 959; *Cereal Mfg. Co. v.*

Bickford, 129 Ind. 236, 28 N. E. 545; *Hunt v. Listenberger*, 14 Ind. App. 320, 326, 42 N. E. 240, 964; *Texas & P. R. Co. v. Snyder* (Tex.) 18 S. W. 559; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271.

And the fact that subpoenas were issued at the instance of a coparty who filed no answer will not avail an applicant who is himself negligent. *Willis v. Sanger Bros.* 15 Tex. Civ. App. 655, 40 S. W. 229. For other cases, see *supra*, § 15 and notes thereto.

**Bates v. Messer*, 76 Ga. 696; *Runnals v. Aycock*, 78 Ga. 553, 3 S. E. 657; *Lamar v. McDaniel*, 78 Ga. 547, 3 S. E. 409; *Bogges v. Lowrey*, 78 Ga. 353, 3 S. E. 771; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 4 L. R. A. 481, 21 N. E. 522. Compare, *Blasland-Parcels-Jordon Shoe Co. v. Hicks*, 70 Mo. App. 301.

"This is generally a statutory provision, and a statement in the affidavit following the language of the statute is generally sufficient. See the various codes and statutes. And see *Lamar v. McDaniels*, 78 Ga. 547, 3 S. E. 409.

Under statutes.—In those jurisdictions, however, in which there are statutory provisions or rules of court the sufficiency of diligence shown is to be tested only by strict compliance with those statutes or rules;¹ and ordinarily an applicant who, in good faith, has complied with those statutory requirements, and shows due diligence used, in the manner required by statute, is entitled to continuance as matter of right,² or at least to a temporary suspension of the trial for a sufficient time to bring in a disobedient witness.³ But the application should be made in apt time.⁴ But an application not purporting to state a case of right to continuance under the statute is addressed to the discretion of the court.⁵

¹*Mullaly v. Springer Lithographing Co.* (Tex. Civ. App.) 29 S. W. 167. And see *Simon v. Sheridan & S. Co.* 21 Misc. 489, 47 N. Y. Supp. 647.

It is not enough under the Texas statute to state that diligence was used to procure the evidence, but it must also be stated that due or sufficient diligence was used. *Crawford v. Saunders* (Tex. Civ. App.) 29 S. W. 102, and authorities cited.

But an honest mistake in summoning the wrong person as a witness, which is not discovered until the night before the trial, entitles to a continuance, if the witness is a material one. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

As to necessity of tendering witness's fees in order to procure a continuance for absence of the witness, see *Texas & P. R. Co. v. Hall*, 83 Tex. 678, 19 S. W. 121; *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618. And see *Doll v. Mundine*, 7 Tex. Civ. App. 96, 26 S. W. 87.

**Re White*, 45 La. Ann. 632, 12 So. 758; *Nichols v. Headley Grocer Co.* 66 Mo. App. 321; *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497; *Smyth v. Wilmington City R. Co.* (Del.) 40 Atl. 189; *Dillingham v. Chapman* (Tex. Civ. App.) 30 S. W. 677; *Texas & P. R. Co. v. Yates* (Tex. Civ.

App.) 33 S. W. 291; *Cleveland v. Cole*, 65 Tex. 402; *Missouri P. R. Co. v. Haynes*, 1 Kan. App. 592; *Reid v. Farmers' & Shippers' Tobacco Warehouse*, 19 Ky. L. Rep. 1939, 44 S. W. 124; *Gulf, C. & S. F. R. Co. v. Mitchell* (Tex. Civ. App.) 45 S. W. 819; *Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co.* 84 Wis. 262, 54 N. W. 506; *Beatrice Sewer Pipe Co. v. Erwin*, 30 Neb. 86, 46 N. W. 279.

So, where a vitally important witness absented himself without the applicant's knowledge or consent and before he could be called, after he had been brought into court by process. *Blasland-Parcels-Jordon Shoe Co. v. Hicks*, 70 Mo. App. 301. But *North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 4 L. R. A. 481, 21 N. E. 522, holds otherwise unless there is affirmative proof that the disappearance was not with the applicant's consent.

A postponement granted to one of two joint defendants, whose answers are separate and distinct and are based on grounds not common, is not a second application as against the other, so as to preclude his obtaining a postponement on an application complying in every particular with the Texas statute governing first applications. *Ft. Worth & N. O. R. Co. v. Enos*, 15 Tex. Civ. App. 673, 39 S. W. 1095.

That a continuance, however, will work a change of venue should not be considered, where the applicant shows reasonable diligence. *Gonring v. Chicago, M. & St. P. R. Co.* 78 Wis. 16, 47 N. W. 18.

*Thus, where it is shown that the sheriff can and did procure her attendance within the time asked. *Blasland-Parcels-Jordon Shoe Co. v. Hicks*, 70 Mo. App. 301.

Although the attachments for the witness are not actually issued until the adjournment is decided upon. *Fish's Eddy Chemical Co. v. Stevens*, 92 Hun, 179, 36 N. Y. Supp. 397.

Otherwise, where the attempt to bring in the witness would be idle, because he is beyond the reach of process. *Fidelity & C. Co. v. Johnson*, 72 Miss. 333, 30 L. R. A. 206, 17 So. 2. And a continuance will not be granted to enable a party by contempt proceedings in another state to compel a contumacious witness to testify by deposition, as there is no presumption that by refusing to answer he is guilty of contempt of court of that state. *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875.

**Walbridge v. J. Dewing Publishing Co.* 53 N. Y. S. R. 935, 24 N. Y. Supp. 602.

And except, perhaps, in cases of surprise, etc., if not so made it is properly denied by the court in the exercise of its sound discretion. *Re Becker*, 3 Pa. Dist. R. 513, 34 W. N. C. 576. See also *Butler v. Farley*, 99 Ga. 631, 25 S. E. 853.

**St. Louis & S. F. R. Co. v. Woolum*, 84 Tex. 570, 19 S. W. 782.

So, of a second application not showing diligence as required by statute. *Rubrecht v. Powers*, 1 Tex. Civ. App. 282, 21 S. W. 318.

Or of an application which is neither the first nor second application, or which, if either, fails to show that every means given by the law to procure the attendance of the witness was used. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

The foregoing rules are stated, as they generally occur, with reference to witnesses; but they apply with equal force, of course, to documentary evidence.

22. — materiality of witness or evidence.

The materiality of the absent evidence must be established by naming the witness who is desired,¹ by stating what the expected testimony will be,² the applicant's belief in its truth,³ and that the same facts cannot be proved by other witnesses within call.⁴ And the materiality of absent documentary evidence, to procure which postponement is sought, must be shown.⁵

¹*Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942. And see the various statutory provisions.

²*People ex rel. Cacheaux v. Hanson*, 150 Ill. 122, 127, 36 N. E. 998; *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942; *Shaver v. Southern Oil Co.* (Tenn. Ch.) 43 S. W. 736; *Leiper v. Earthman* (Tenn. Ch.) 46 S. W. 321; *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. 34; *Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 763. So that the adverse party may, if he choose, admit the facts and have the case proceed to trial. *Heise v. Pennsylvania R. Co.* 11 Lanc. L. Rev. 31.

So, where witness is said to be in possession of important papers, applicant must state what the papers are, and what his expected testimony will be. *German Ins. Co. v. Penrod*, 35 Neb. 273, 53 N. W. 74.

But *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78, and *Coombs v. Brenklander*, 29 Neb. 586, 45 N. W. 929, hold that he need not state the nature of the testimony which he expects to procure.

³*Rowland v. Shephard*, 27 Neb. 494, 43 N. W. 344.

⁴*Outcalt v. Johnson*, 9 Colo. App. 519, 49 Pac. 1058; *Rowland v. Shephard*, 27 Neb. 494, 43 N. W. 344; *Hyde v. Territory* (Okla.) 56 Pac. 851.

⁵*Owen v. Cibolo Creek Mill & Min. Co.* (Tex. Civ. App.) 43 S. W. 297.

23. — probable attendance or procurement.

And the probable attendance of the absent witness, or procurement of the desired evidence, at the proper time, must be assured with a reasonable degree of certainty.¹

¹*Smyth v. Wilmington City R. Co.* (Del.) 40 Atl. 189; *Home F. Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84; *Rowland v. Shephard*, 27 Neb. 494, 43 N. W. 344; *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497; *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. 34; *Western U. Teleg. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. 982.

But the court is not bound to grant a continuance where it is conjectural whether the absent witnesses are living, or, if so, where they reside, or when, if at all, their evidence can be procured. *Lowenstein v. Greve*, 50 Minn. 383, 52 N. W. 964.

Or where the witness has no home, relatives, business, or ties in the state,

has not been seen for months, nothing is known of his whereabouts, and there is no ground for believing his attendance could be secured at a subsequent time. *Carberry v. Worrell*, 68 Miss. 573, 9 So. 290.

Or where the expected attendance was merely surmised and the desired evidence was in substance supplied by other witnesses. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079. See also *Post v. State ex rel. Hill*, 14 Ind. App. 452, 42 N. E. 1120.

And so of a second adjournment to recall a witness who has left the state, where no time is shown when his attendance can reasonably be expected. *Borley v. Wheeler & Wilson Mfg. Co.* 34 N. Y. S. R. 987, 12 N. Y. Supp. 45.

And a postponement asked because of a trial amendment, after an offer to adjourn over two days is declined, is properly refused, in the absence of a showing that the evidence cannot be procured in the time offered. *Clough v. Bennett*, 99 Iowa, 69, 68 N. W. 578.

24. — incompetency, immateriality, irrelevancy, etc.

But a postponement cannot be had because of the absence of evidence which, if offered, would be excluded as incompetent,¹ or as mere hearsay,² or irrelevant,³ or immaterial either to the issue⁴ or to the result,⁵ or cumulative,⁶ or improbable,⁷ or not the best evidence procurable.⁸ Nor because of the absence of a witness who is incompetent to testify.⁹

¹*Watkins v. Atwell* (Tex. Civ. App.) 45 S. W. 404; *Dayton Spice-Mills v. Sloan*, 49 Neb. 622, 68 N. W. 1040. See also *Mattfield v. Cotton* (Tex. Civ. App.) 47 S. W. 549; *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 739.

So, where the testimony which the absent witness would give would constitute no defense. *Texas & P. R. Co. v. Turner* (Tex. Civ. App.) 37 S. W. 643.

²*Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659.

³*White v. Waco Bldg. Asso.* (Tex. Civ. App.) 31 S. W. 58; *Biggar v. Lister* (Tex. Civ. App.) 27 S. W. 707; *Morrison v. Stauffer* (Tex. Civ. App.) 32 S. W. 722; *Pacific Exp. Co. v. Lasker Real Estate Asso.* 81 Tex. 81, 16 S. W. 792.

See also *Crouch v. Johnson*, 7 Tex. Civ. App. 435, 27 S. W. 9.

As testimony that defendant, in an action for work and labor, never employed plaintiff at all, and that plaintiff never worked for defendant, where defendant merely denies the indebtedness without denying the services alleged, and pleads a counterclaim. *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953.

So, also, after dismissal of the only issue to which it would relate. *Herd v. Herd*, 71 Iowa, 497, 32 N. W. 469.

⁴*Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292; *Nebraska Land & Live Stock Co. v. Burris*, 10 S. D. 430, 73 N. W. 919; *Stringam v. Parker*, 159 Ill. 304; 42 N. E. 794; *West Chicago Park Comrs. v. Barber*, 62 Ill.

App. 108; *School Directors v. Hentz*, 57 Ill. App. 648; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Witowski v. Maisner*, 21 Misc. 487, 47 N. Y. Supp. 599; *Smokey v. Johnson* (Miss.) 4 So. 787.

**Simpson v. Simpson* (Cal.) 41 Pac. 804; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, 53 Neb. 481, 73 N. W. 942; *Shaver v. Southern Oil Co.* (Tenn. Ch.) 43 S. W. 736; *Scurry v. Fromer* (Tex. Civ. App.) 26 S. W. 461; *Kennedy v. Yoe* (Tex. Civ. App.) 39 S. W. 946; *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428.

Or because not essential to a full and fair understanding of the facts in the case. *St. Louis S. W. R. Co. v. Freedman* (Tex. Civ. App.) 46 S. W. 101.

Or because not essentially and materially different from that of the adverse party. *Helfrich Saw & P. Mill Co. v. Everly*, 17 Ky. L. Rep. 795, 32 S. W. 750.

**Missouri, K. & T. R. Co. v. Wright* (Tex. Civ. App.) 47 S. W. 56; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802. And see *Robbins v. Ginnocchio* (Tex. Civ. App.) 45 S. W. 34.

But evidence is not cumulative within this rule where it consists of facts bearing on the issue to which no other witnesses testified, although they did testify to other facts relating to the same issue. *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618.

Or where the witness present is an interested party contradicted by another. *Maynard v. Cleveland*, 76 Ga. 52.

**Nix v. Pope* (Tex. Civ. App.) 37 S. W. 617.

**Stewart v. Townsend*, 41 Fed. Rep. 121.

*Thus, of a convict. *Tillman v. Fletcher*, 78 Tex. 675, 15 S. W. 161.

25. Affidavit may be required.

Upon an application to postpone a trial the court may require that the facts stated as the ground of the application be presented by affidavit.¹

¹*Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; (a well-considered case, where it is said that *the party* may require it); *Tribune Asso. v. Smith*, 8 Jones & S. 251; *Thompson v. Mississippi Ins. Co.* 2 La. 228, 22 Am. Dec. 129. And such affidavit is generally required by the statutes of the various states governing postponements. *Cozzens v. Chicago Hydraulic-Press Brick Co.* 166 Ill. 213, 46 N. E. 788; *McGrath v. Tal- lent*, 7 Utah, 256, 26 Pac. 574; *Scullen v. George*, 65 Mich. 215, 31 N. W. 841; *Bronson v. Vaughan*, 44 W. Va. 406, 29 S. E. 1022; *Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634; *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Diebold Safe & Lock Co. v. Holt*, 4 Okla. 479, 46 Pac. 512; *Texas & N. O. R. Co. v. Goldberg*, 68 Tex. 685, 5 S. W. 824. See also statutes of various other states.

But merely offering to file the statutory affidavit without actually doing so is insufficient. *Ryan v. People use of Degan*, 165 Ill. 143, 46 N. E. 206, Affirming 62 Ill. App. 355.

But oral statements, if not objected to, are of equivalent effect. *Tribune Asso. v. Smith*, 8 Jones & S. 251; *Thompson v. Mississippi Ins. Co.* 2 La. 228, 22 Am. Dec. 129.

They must, however, be made under oath. *Mackin v. Cody*, 68 Ill. App. 108.

Although granting a continuance by a justice without affidavit or other legal evidence than counsel's mere oral statement showing the necessity therefor is error, it will not authorize the issuance of mandamus to compel dismissal of the action. *Whaley v. King*, 92 Cal. 431, 28 Pac. 579.

26. — sufficiency.

A motion for leave to file a supplemental affidavit to supply insufficiency in the original is properly refused in the discretion of the court.¹ But an affidavit good when filed should not be deemed bad because the court has not acted on it for several days and the conditions may have changed.²

¹*Mackin v. Delles*, 68 Ill. App. 101.

²*Harrigan v. Turner*, 53 Ill. App. 292.

27. — who to make.

An affidavit by the party may be required, unless sufficient reason for accepting the affidavit of another person appears.¹ Refusing to accept the attorney's affidavit when inability of the party to make it is shown is error.²

¹Thus, an affidavit not sworn to by the applicant or his authorized agent is insufficient under the Illinois practice act. *School Directors v. Hentz*, 57 Ill. App. 648.

The court will not receive the affidavit of the attorney's clerk unless it state that he has the management of the cause and is particularly acquainted with the circumstances. *Sullivan v. Magill*, 1 H. Bl. 637.

²*Lockhart v. Wolf*, 82 Ill. 37 (judgment reversed for this error). See also *Light v. Richardson* (Cal.) 31 Pac. 1123; *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380.

And *Doll v. Mundine* (Tex.) 19 S. W. 394, holds it error to refuse to accept counsel's affidavit averring absence of witnesses, materiality of their evidence, and diligence used to procure their attendance, because those facts are of such character that they may be as well known to counsel as to client.

Otherwise, where the inability is not shown, and especially where the party in whose behalf the affidavit was made was a mere nominal party, and it is not shown that affiant had a better knowledge of the desired evidence than either the nominal or real party. *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983.

28. — contents.

An affidavit to support an application to postpone, on account of absence of evidence,¹ must be to: (1) The merits;² (2) The materiality of the desired evidence;³ (3) facts showing due diligence already exercised in the endeavor to procure it;⁴ and (4) assurance of probable presence of the evidence at the time proposed.⁵

¹This rule is generally stated, as it generally occurs, as relating to witnesses; but it applies to documents also. See *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930. And see cases cited *infra*, this and next succeeding section.

²*Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 383; *Hill v. Prosser*, 3 Dowl. P. C. 704. (Oath to merits not required in England).

Thus, an affidavit stating that the applicant has fully and fairly stated the case to his counsel sufficiently states that fact within a rule of court. *Sutton v. Wegner*, 72 Wis. 294, 39 N. W. 775.

³*Kern Valley Bank v. Chester*, 55 Cal. 49; *Green v. King*, 17 Fla. 452; *Hefling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424; *McClurg v. Ingleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; *People v. Vermilyea*, 7 Cow. 369, 384; *Farmers & M. Bank v. Berchard*, 32 Neb. 785, 49 N. W. 762; *Stone v. Chicago, M. & St. P. R. Co.* (S. D.) 53 N. W. 189.

Even though the evidence is to meet issues raised by trial amendment. *Storch v. McCain*, 85 Cal. 304, 24 Pac. 639.

And in causes in which there are no pleadings the affidavit must show the materiality to issues that will arise on trial. *Hewes v. Andrews*, 12 Colo. 161, 20 Pac. 338; *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189.

The affidavit should state, not mere conclusions, but facts, in the same manner as such facts are usually stated in a deposition. *Willard v. Pettitt*, 54 Ill. App. 257, Affirmed, 153 Ill. 663, 39 N. E. 991; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983. See also *Willis v. Sanger Bros.* 15 Tex. Civ. App. 655, 40 S. W. 229; *Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717; *Evans v. Marden*, 154 Ill. 443, 40 N. E. 446.

And so definitely and certainly that the adverse party may, if he desire, admit that the witness would so testify if present. *Hagar v. Wikoff*, 2 Okla. 580, 39 Pac. 281.

In Nebraska, the affidavit may be substantially in the words of the statute; and it is unnecessary to state the purport of the testimony which the applicant expects to procure. *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78. But an affidavit stating that the deposition, the loss of which is the basis of the application, "was the same as and fully supported the allegations of the answer," without setting out at least the substance of the testimony, is insufficient. *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930.

Otherwise in California, in a case sought to be postponed for absence of a party claimed to be a material witness. *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636.

Omission to name the witness held no objection in *Smith v. Dobson*, 2 Dowl. & R. 420. And see *Brown v. Murray*, 4 Dowl. & R. 832.

The contrary rule, however, prevails in the United States. *Keith v. Knoche*, 43 Ill. App. 161; *McClurg v. Ingleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942, Affirmed on Rehearing in 55 Neb. 341, 75 N. W. 862.

**Kern Valley Bank v. Chester*, 55 Cal. 49; *Green v. King*, 17 Fla. 452; *Wolcott v. Mack*, 53 Ind. 269; *Ilett v. Collins*, 102 Ill. 402; *Sprague v. Heaps*, 7 Ill. App. 447; *Anheuser-Busch Brewing Asso. v. Hutmacher*, 127 Ill. 652, 4 L. R. A. 575, 21 N. E. 626; *McClurg v. Ingleheart*, 33 S. W. 80, 17 Ky. L. Rep. 913; *Moon v. Helfer*, 25 Kan. 139; *Ingalls v. Noble*, 14 Neb. 272, 15 N. W. 351; *Thomas v. McCormick*, 1 N. M. 369; *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; *People v. Vermilyea*, 7 Cow. 369, 384; *Labbaite v. State*, 6 Tex. App. 257; *Handline v. State*, 6 Tex. App. 347; *Flournoy v. Marx*, 33 Tex. 786 (holding a general averment of due diligence not enough); *Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035; *Falls Land & Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479; *Stone v. Chicago, M. & St. P. R. Co.* (S. D.) 53 N. W. 189. See also *King v. D'Eon*, 1 W. Bl. 510, 3 Burr. 1513.

It is not enough to state the mere legal conclusion that diligence had been used. *Missouri P. R. Co. v. Aiken*, 71 Tex. 373, 9 S. W. 437; *Singer Mfg. Co. v. McAllister*, 22 Neb. 359, 35 N. W. 181; *Leiper v. Earthman* (Tenn. Ch.) 46 S. W. 321; *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953.

Or that diligent inquiries were made, without either stating how, where, or of whom they were made. *Kilmer v. St. Louis, Ft. S. & W. R. Co.* 37 Kan. 84, 14 Pac. 465; *Struthers v. Fuller*, 45 Kan. 735, 26 Pac. 471.

Or when the witness left, and whether any attempt was made to serve a subpoena or to take his deposition, and whether further inquiries were made. *Haverstick v. State ex rel. Haverstick*, 6 Ind. App. 595, 32 N. E. 785, 6 Ind. App. 598, 34 N. E. 589.

It must be shown, under the Texas statute, that by the exercise of due diligence the witness's deposition could not have been taken, nor he have been present in person to testify. *Grounds v. Ingram*, 75 Tex. 509, 12 S. W. 1118; *Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035.

And failure to make the statutory oath that due diligence has been used to procure the desired evidence, stating the diligence used, leaves the matter of continuance to the court's sound discretion. *St. Louis & S. F. R. Co. v. Woolum*, 84 Tex. 570, 19 S. W. 782.

In Kentucky, on an application for continuance to secure the attendance of absent witnesses, the affidavit should show that applicant has the right to require their attendance by showing that they reside within 20 miles of the county seat. *Cope v. Deaton*, 19 Ky. L. Rep. 1197, 43 S. W. 190.

**Sprague v. Heaps*, 7 Ill. App. 447; *Mantonya v. Huerter*, 35 Ill. App. 27; *Lake Erie & W. R. Co. v. Holderman*, 56 Ill. App. 144; *McClelland v. Scroggin*, 48 Neb. 141, 66 N. W. 1123; *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; *Brown v. Moran*, 65 How. Pr. 349; *Cabell v. Holloway*, 10 Tex. Civ. App. 307, 31 S. W. 201; *Stone v. Chicago, M. & St. P. R. Co.* (S. D.) 53 N. W. 189.

ABB.—3.

And an affidavit to support an application to postpone on account of the absence of party must state definitely and clearly the cause of the absence.¹ But not the reason why his presence is necessary.²

¹*McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358; *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953; *Davis v. Foreman* (Tex.) 20 S. W. 52.

And see *Bergevin v. Barnard*, 72 Ill. App. 47.

²*Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620 (holding it error to require).

And to support an application to postpone on account of absence of counsel, the affidavit should show diligence on counsel's part in learning the time of trial.¹ And in Illinois, it must state that counsel, who is a member of the legislature, is in actual attendance upon a session thereof;² that the suit sought to be postponed was begun, and he was actually employed, prior to the commencement of the session,³ and that his attendance is necessary to a fair and proper trial.⁴

¹*Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335.

²*Mackin v. Cody*, 68 Ill. App. 108.

³*Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. W. 88.

The phrase "in such suit," as used in the statute, refers to a suit actually commenced, and not to a mere controversy or threatened or anticipated suit. *Weighard v. Fieldon Creamery Co.* 65 Ill. App. 202, holding that the use of the words "this cause" in the affidavit meant only that, anticipating a suit, the applicant had retained the counsel in advance,—especially as, in fact, suit was not begun until about four months after the legislature convened.

⁴*McClory v. Crawley*, 59 Ill. App. 392.

And an affidavit to support an application grounded on surprise occasioned by amendment to opposite party's pleading allowed by the court must show that the applicant is less ready for trial, why and how,¹ and that surprise is not claimed for the purpose of delay.²

¹*Benepe v. Meier*, 75 Ill. App. 561; *Texas & N. O. R. Co. v. Goldberg*, 68 Tex. 685, 5 S. W. 824; *Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634; *Lindsey v. Lindsey*, 40 Ill. App. 389. It must show in what respect the applicant is prejudiced in his preparation for trial, as required by statute. *Diebold Safe & Lock Co. v. Holt*, 4 Okla. 479, 46 Pac. 512. And under the Illinois statute what particular facts he expects to prove. *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087.

And an affidavit which merely shows that in affiant's opinion he has a just case which he will be able to present and sustain, if given time, is insufficient. *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

²*Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634.

An affidavit that defendant's attorney believed that the case could not be tried at that term, and had not prepared for trial, is insufficient.¹

¹*Mills v. National F. Ins. Co.* 92 Wis. 90, 65 N. W. 730.

Allegations on information must state the names and residences of the informants.¹

¹*Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *Thompson v. Mississippi Marine & F. Ins. Co.* 2 La. 228, 22 Am. Dec. 129; *Labbaite v. State*, 6 Tex. App. 257. Compare *Lansky v. West End Street R. Co.* 173 Mass. 20, 53 N. E. 129; *Smith v. Roome*, 20 Misc. 8, 44 N. Y. Supp. 784; *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062.

In some cases inability to procure another witness instead is required to be shown. *Jarvis v. Shacklock*, 60 Ill. 378.

29. — — disclosing materiality.

In stating the materiality of the desired evidence, a general allegation is usually enough on a first application.¹

¹*People v. Vermilyea*, 7 Cow. 369, 386; *Hooker v. Rogers*, 6 Cow. 577; *Wicker v. Boynton*, 83 Ill. 545 (*dictum*). *Contra*, *Kern Valley Bank v. Chester*, 55 Cal. 49. A statement that an absent defendant will testify "materially as stated in the answer," which is merely a general denial and two matters in reconvention, does not sufficiently show the evidence proposed so as to enable its materiality to be determined. *Crawford v. Lozano* (Tex. Civ. App.) 48 S. W. 538.

And *Bradshaw v. Stott*, 7 App. D. C. 276, holds that to state merely that the testimony is "material, proper, and competent" is not sufficient.

An application is deemed to be a first application within this rule if the only previous application prove not to have delayed the cause, by reason of its not having been reached. *Pulver v. Hiserodt*, 3 How. Pr. 49.

But if a postponement had already been had,¹ or if circumstances of suspicion or intimation of laches appear,² or if the necessary delay is great,³ the court may require that the affidavit state what the desired evidence will prove,⁴ and the names and residences of desired witnesses,⁵ or disclose the nature of the evidence sufficiently to see that upon fair and probable grounds it will be material.⁶

¹*Moon v. Helfer*, 25 Kan. 139.

²*People v. Vermilyea*, 7 Cow. 369, 384; *Bush v. Weeks*, 24 Hun, 545 (justice's court case).

³*Lord v. Cooke*, 1 W. Bl. 436.

*In *Ogden v. Payne*, 5 Cow. 15, it was held that the mere fact that the desired witness was the attorney of the party, so that it was possible his testimony might be privileged, was not ground for requiring a disclosure.

**Ilett v. Collins*, 102 Ill. 402; *Thomas v. McCormick*, 1 N. M. 369; *Lillienthal v. Anderson*, 1 Idaho, 673; *Vanwey v. State*, 41 Tex. 639 (affidavit omitting to state knowledge of residences). And, according to *Brown v. Johnson*, 14 Kan. 377, and *Cody v. Butterfield*, 1 Colo. 377, sufficiently to give the adverse party a right to defeat the application by admitting the facts.

*The motion should be denied if the desired evidence is inadmissible under the pleadings. *Cartwright v. Culver*, 74 Mo. 179; *Waldo v. Beckwith*, 1 N. M. 182; *Thackaray v. Hanson*, 1 Colo. 365. And may be denied if the witness is privileged. *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599.

The desired evidence must be stated so definitely in a second application that the jury could find their verdict on it should they believe it if admitted. *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440 (allegation that the absent witnesses will prove the amount of damages much less than plaintiff claims, but not stating the amount which they will prove them, held to be insufficient).

So, an affidavit for a second continuance stating that defendant expects to prove "certain conduct and actions of plaintiff" which contradict his allegations of a previous partition of land, but not stating what those acts were, is too indefinite. *Doll v. Mundine*, 7 Tex. Civ. App. 96, 23 S. W. 87.

An affidavit in support of a third application, which does not state what is expected to be proved by the absent witnesses, but refers to a former affidavit, is insufficient. *Leiper v. Earthman* (Tenn. Ch.) 46 S. W. 321.

And it must *negative ability* to prove the desired evidence by other witnesses. *Hodges v. Nash*, 141 Ill. 391, 31 N. E. 151; *Mutzenburg v. McGowan*, 10 Colo. App. 486, 51 Pac. 523; *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283; *Livingston v. Cooper*, 22 Fla. 292.

30. Opposing the motion; presumptions.

It is presumed that the applicant will state the facts as strongly in his own favor as the nature of the case permits, and therefore the court is not called upon to make presumptions in his favor.¹

¹Per *Ogden, J.*, in *Van Brown v. State*, 34 Tex. 186; *Dold v. Dold*, 1 N. M. 397.

And a court refusing a continuance for reasons not supported by affidavit of a creditable witness should, at least, have personal knowledge thereof, and not merely draw conclusions from other facts known to him. *Corisicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

31. — counter-affidavits.

The court may, in its discretion, receive counter-affidavits;¹ and the party making the affidavit may be called for the purpose of cross-

examination by his adversary.² But evidence to disprove the facts which the applicant desires opportunity to prove is inadmissible.³

¹So in some states by statute. Ga. Code 1895, § 5138; Iowa Code 1897, § 3668; N. C. Code Civ. Proc. § 402. But they must be limited to a contradiction of allegations of due diligence used. *State v. Rainsbarger*, 74 Iowa, 196, 37 N. W. 153. Especially where there is suspicion of fraud or imposition. *Cushenberry v. McMurray*, 27 Kan. 328.

Even a justice of the peace has discretionary power to allow plaintiff to introduce evidence showing that defendant's application for postponement is not made in good faith and is groundless. *Weed v. Lee*, 50 Barb. 354.

But in the *Star Route Case* (D. C. 1882), Wylie, J., refused to do so, saying that a motion for continuance must be decided on the affidavit of the party applying for it. To the same effect are *Wick v. Weber*, 64 Ill. 167, and *Quincy Whig Co. v. Tillson*, 67 Ill. 351, intimating that it is error to receive counter-affidavits.

In *Walt v. Walsh*, 10 Heisk. 314, the court declined to pass upon the practice of hearing counter-affidavits, but intimated that it is proper for the inferior court to hear enough of the testimony to enable it to pass upon the motion.

And in *State v. Belvel*, 89 Iowa, 405, 27 L. R. A. 846, 56 N. W. 545, it was held that affidavits in opposition to a motion for continuance may be received for purposes other than to contradict statements as to what the testimony of absent witnesses will be.

And see *Barton v. McKay*, 36 Neb. 632, 54 N. W. 968, holding their reception, although improper, harmless error where the applicant's affidavit considered alone was insufficient. See also *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88, and *Waarich v. Winter*, 33 Ill. App. 36.

This question arose in *McClurg v. Ingleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80, where the court in discussing it distinguished between an application based on the ground of absence of important testimony and one based on the absence of an interested party. After citing and quoting from several authorities they reached the conclusion that in the former case, if the affidavit sets forth fully and certainly what is expected to be proved by them, giving their names and showing diligence, counter-affidavits could not be received to controvert it because the statute governing continuances on that ground makes the continuance a matter of right, and not of discretion; but held that in the latter case, which was the case at bar, and in reference to which there was no specific statute, the sufficiency of the affidavit was to be determined by the trial court in its sound judicial discretion, and that in the absence of such statutory regulation it might permit the evidence to be controverted.

²*Smyth v. Wilmington City R. Co.* (Del.) 40 Atl. 189.

³*Horn v. State*, 62 Ga. 362. And in *Waldrup v. Maxwell*, 84 Ga. 613, 10 S. E. 597, judgment was reversed for error in refusing a continuance on a counter-showing of a statement by the absent witness to the adverse party that he knew nothing about the case.

32. — admitting desired facts.

Where the applicant discloses what facts he intends to prove by the desired evidence, it is a sufficient answer to the application to admit the truth of those facts.¹

¹*Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328; Cal. Code Civ. Proc. § 595; *Green v. King*, 17 Fla. 452; *Kitchens v. Hutchins*, 44 Ga. 620; Ga. Code, § 3472; *State v. Plowman*, 28 Kan. 569; *Brown v. Johnson*, 14 Kan. 377; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; Kan. Civ. Code, § 317; *Hutton v. First Nat. Bank*, 20 Ky. L. Rep. 225, 45 S. W. 668; Ky. Civ. Code, § 315; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802; Mo. Rev. Stat. § 3596; *Brill v. Lord*, 14 Johns. 341 (even under a statute requiring a justice to postpone for such reasonable time as will enable the defendant to procure testimony or witnesses); *Chandler v. Colcord*, 1 Okla. 260, 32 Pac. 330; Okla. Stat. § 4449; *Maughmer v. Bering* (Tex. Civ. App.) 46 S. W. 917.

So, also, even where the desired witness was the party himself on whose behalf the application was made. *Pate v. Tait*, 72 Ind. 450; *Pruyn v. Gibbens*, 24 La. Ann. 231.

But he need not admit what is cumulative. *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796.

Any defect in the affidavit, which is not specially assigned, is waived by such an admission. *Beal v. Pratt*, 67 Ill. App. 483.

The rule is otherwise, however, when the witness's presence is necessary to a fair trial because of his personal knowledge of the matters in controversy and ability to aid in preventing surprise. *Hopkinson v. Jones*, 28 Ill. App. 409.

But the admission must be unqualified.¹ It is not enough to admit that the desired witness would swear to such facts.² And after such admission the statement in the application should be treated as the witness's deposition;³ but it is not entitled to any greater weight than would be the testimony of the witness himself if present.⁴ And opposing testimony to impeach it cannot be introduced without the usual foundation being first laid.⁵ Nor can such an admission be withdrawn because the witness has come into court.⁶

¹*Nave v. Horton*, 9 Ind. 563; *Cheney v. Smith*, 42 Ga. 50; Ga. Code, § 3472; *Klugman v. Gammell*, 43 Ga. 581; *Smith v. Creason*, 5 Dana, 298, 30 Am. Dec. 688.

²*People v. Vermilyea*, 7 Cow. 369, 388, 389, 400; *Pate v. Tait*, 72 Ind. 450; *Maughmer v. Bering* (Tex. Civ. App.) 46 S. W. 917.

But the truth of the testimony must also be admitted. *Seward v. Wilmington*, 2 Marv. (Del.) 375.

³*St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

⁴*Waldron v. Home Mut. Ins. Co.* 16 Wash. 193, 47 Pac. 425 (refusing to

disturb the verdict on the ground that the jury discredited such testimony, and believed a witness who swore in direct opposition to the affidavit). And *Burris v. Court*, 48 Neb. 179, 66 N. W. 1131, holds that such an admission is not equivalent to an admission that the proposed testimony is absolutely true and indisputable.

**St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

**Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758.

33. Imposing conditions; costs.

The court may impose payment of costs and disbursements as a condition.¹

**Voorhees v. Chicago, R. I. & P. R. Co.* 71 Iowa, 735, 30 N. W. 29; *McDonald v. Weir*, 76 Mich. 243, 42 N. W. 114.

As, where no affidavit was presented therefor until after the jury were sworn and the evidence heard in part. *Morrison v. Beckham*, 16 Ky. L. Rep. 294, 27 S. W. 868.

In the absence of special cause for other conditions this is all that should be required. *Hall v. Dwinell*, 10 Wend. 628.

A party to whom a continuance is offered on terms, and in favor of whom judgment is rendered on trial had after the continuance, may, if the question be properly saved, have a ruling imposing the terms revised on appeal. *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40.

Otherwise, if the judgment goes against him. *Ibid.*

In some states the matter is regulated by statute. N. Y. Code Civ. Proc. § 3255. And compare other statutes.

These statutes generally leave the imposition of such a condition discretionary with the trial court, though some of them are mandatory. For illustrative cases in those states having statutes, see *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53; *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847; *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051; *State ex rel. Congdon v. Second Judicial Dist. Ct.* 10 Mont. 456, 26 Pac. 182. Under the Vermont statute, the postponement may be granted on terms to be thereafter determined. *Collins v. Richardson*, 66 Vt. 89, 28 Atl. 877.

Amount.—In New York the costs cannot exceed \$10, besides taxable disbursements and witness fees. Code Civ. Proc. § 3255; *Noxon v. Bentley*, 6 How. Pr. 418; *Jackson v. McBurney*, 6 How. Pr. 408; *Kennedy v. Wood*, 26 N. Y. S. R. 34, 7 N. Y. Supp. 90. Unless leave to amend is granted.

In Washington the court cannot impose the payment of more than \$10 in addition to witness fees. Code Civ. Proc. § 832; *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 528, 37 Pac. 426, 427.

In California the court is not limited to the taxable costs, but may impose payment of a reasonable gross sum. *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683.

And their payment within a fixed time may be further imposed as a condition to the party's further appearance and participation at trial.¹

¹*Alexander v. Moore*, 111 Ala. 410, 20 So. 339, sustaining an order for continuance granted to defendant on such condition, which stipulated that in default of payment by the first day of the next term judgment by default would be rendered against him. But see *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 528, 37 Pac. 426, 427.

Unless otherwise directed such payment is to be made instant¹, and without awaiting formal demand.²

¹*Jackson ex dem. Pinkney v. Pell*, 19 Johns. 270; *Bulkeley v. Keteltas*, 2 Sandf. 735. Compare *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 528, 37 Pac. 426, 427. And some of the statutes expressly provide that the order of continuance shall not be effective until the costs for the term shall have been paid or secured by the applicant. Thus, in Arkansas, Sand. & H. Dig. § 5799. Compare other statutes.

²*Jackson ex dem. Pinkney v. Pell*, 19 Johns. 270. Compare *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 528, 37 Pac. 426, 427.

And the applicant cannot excuse his nonpayment on the ground that an itemized bill was not furnished where he neither made offer of payment nor requested a bill. *Maund v. Loeb*, 87 Ala. 374, 6 So. 376.

34. — stipulation against abatement.

On granting an application made on behalf of a party dangerously ill, the court may require a stipulation that death before final judgment shall not abate the action.¹

The attorney has power to bind his client by such a stipulation.²

¹*Ames v. Webbers*, 10 Wend. 576.

²*Cox v. New York C. & H. R. R. Co.* 63 N. Y. 414, Reversing 4 Hun, 176, 6 Thomp. & C. 405. It was there conceded that counsel have the same power as the attorney of record. But in *Nightingale v. Oregon C. R. Co.* 2 Sawy. 338, Deady, J., granted plaintiff's motion to set aside an order for continuance, on the ground that it was entered on a stipulation signed by counsel only, he being of opinion that only the attorney of record could sign such a stipulation, and that neither counsel, even though interested in the cause of action, nor the client himself, having an attorney of record, could do so.

The true rule is that counsel, having sufficient authority to appear for the trial of the cause (and an application to postpone is part of the trial), have, at least in the absence of the attorney of record, and equally in his presence and without his dissent, authority to bind the client by acceding to any condition the court have power to impose.

35. — staying another suit.

A postponement, accepted on condition that the trial of an action between the same parties in another court of competent jurisdiction shall be stayed for a certain time, necessitates postponement of the former action if called for trial before the expiration of that time.¹

¹Thus, an action by a receiver in a court of ancillary jurisdiction should be postponed, where postponement of another suit by the receiver on the same cause of action in the court of original jurisdiction had been accepted by him on condition that he would not proceed to trial with the ancillary suit until the next term of court of original jurisdiction, and that term had not convened when the ancillary suit was called for trial. *Wheeling Bridge & Terminal R. Co. v. Cochran*, 85 Fed. Rep. 500.

36. Remedy for refusal.

By the weight of authority an exception lies to the refusal of an applicant to postpone,¹ if made before going on with the trial;² and the affidavits may be made a part of the record.³

In the Federal courts, however, the contrary has been held, the decision of the court below being regarded as discretionary, and not reviewable in error;⁴ but recent cases recognize the more liberal rule that, though discretionary, the decision can be reviewed if a clear case of abuse is established, resulting in material injury to the applicant.⁵

And some of the state courts also hold that no exception lies to a refusal,⁶ unless the application is based on a statutory ground, and the applicant has fully complied with the statute.⁷

¹*Howard v. Freeman*, 3 Abb. Pr. N. S. 292, 7 Robt. 25; *Gallaudet v. Steinmetz*, 6 Abb. N. C. 224, 13 Jones & S. 239; *Gregg v. Howe*, 5 Jones & S. 420; *Lillienthal v. Anderson*, 1 Idaho, 673; *Johnson v. Dinsmore*, 11 Neb. 391, 9 N. W. 558.

Granting or refusing a continuance rests in sound discretion, and the appellate court will only interfere in the cases of unreasonable discretion. *Lillienthal v. Anderson*, 1 Idaho, 673; *Davis v. Read* (Ark.) 12 S. W. 558; *Barnes v. Barnes*, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292; *Johnston v. Patterson*, 91 Ga. 531, 18 S. E. 350; *Post v. State ex rel. Hill*, 14 Ind. App. 452, 42 N. E. 1120; *Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634; *Borland v. Chicago, M. & St. P. R. Co.* 78 Iowa, 94, 42 N. W. 590; *Westheimer v. Cooper*, 40 Kan. 370, 19 Pac. 852; *Labouisse v. Orleans Cotton Rope & Mfg. Co.* 43 La. Ann. 582, 9 So. 492; *Walter A. Wood Mowing & Reaping Mach. Co. v. Vanderbilt*, 109 Mich. 489, 67 N. W. 691; *Lowenstein v. Greve* (Minn.) 52 N. W. 964; *Valle v. Picton*, 91 Mo. 207, 3 S. W. 860; *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897; *Slingluff v. Hall*, 124 N. C. 397, 32 S. E. 739; *Richardson v. Penny*, 6 Okla. 328, 50 Pac. 231; *DeGrote v. DeGrote*, 175 Pa. 50, 34 Atl. 312; *Nebraska Land & Live*

Stock Co. v. Burris, 10 S. D. 430, 73 N. W. 919; *Leiper v. Earthman* (Tenn. Ch.) 46 S. W. 321; *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah, 319, 15 Pac. 253; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

A judgment by default after refusal to adjourn will not be disturbed on appeal where, under the circumstances disclosed, the trial court was fully warranted in denying the adjournment and rendering the judgment. *Bird v. Snow*, 24 Misc. 759, 53 N. Y. Supp. 900. Nor will a judgment be disturbed which accords the complaining party all the relief that a postponement would have given him. *Morrison v. Hedenburg*, 138 Ill. 22, 27 N. E. 460.

But if a party be ruled into a trial when it appears that he is entitled to a postponement, the judgment or decree against him will be reversed on appeal. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Zuckerman v. Hawes*, 146 Ill. 59, 34 N. E. 479.

But he must ask for the postponement; otherwise, the error is waived. *Wyland v. Mendel*, 78 Iowa, 739, 37 N. W. 160.

The propriety of the refusal will be tested by the affidavits in support of the application, and it cannot be justified by a reference to the proofs adduced on a subsequent trial. *Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co.* 84 Wis. 262, 54 N. W. 506. But it is not reversible error for a witness to testify in the presence of a jury on an application where no objection is offered, no motion made to strike out, and the court is not asked to instruct the jury to disregard the testimony. *Roller v. James*, 6 Kan. App. 919, Appx. 49 Pac. 630.

A ruling on an application to postpone, based on a question of fact as to which the evidence is conflicting, will not be disturbed on appeal. *Sutherland v. Lawless*, 59 Mo. App. 157.

Error in refusing to postpone for a certain time is not waived by taking part in a subsequent trial on the merits. *Ogden v. Danz*, 22 Ill. App. 544. Unless the trial does not take place until after the expiration of the time asked. *Baldwin v. Rhea*, 33 Neb. 319, 50 N. W. 1.

²A motion to suspend the trial to enable the applicant to obtain testimony is addressed to the discretion of the court. *Rapelye v. Prince*, 4 Hill, 119, 40 Am. Dec. 267. So held even where defendant wished to call plaintiff. *Holbrook v. Wilson*, 4 Bosw. 64, 72.

But there is no merit in error assigned on refusal of an application after all the evidence had gone to the jury. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. Or of an application, in an action to try title, grounded on surprise at the exclusion of deeds, and refusal to permit parol evidence identifying applicant with the land, where the description could not be aided by extrinsic evidence. *Simpson v. Johnson* (Tex. Civ. App.) 44 S. W. 1076. Or where no excuse is offered for the failure to procure the evidence within the time allowed for the purpose. *Robbins v. Hanbury*, 37 Fla. 468, 19 So. 886; *Atchison, T. & S. F. R. Co. v. O'Melia*, 1 Kan. App. 374, 41 Pac. 437.

Otherwise of an application to allow plaintiff time to meet an entirely new

item of counterclaim which defendant was allowed to interpose by trial amendment. *Vale v. Trader*, 5 Kan. App. 307, 48 Pac. 458.

**Howard v. Freeman*, 3 Abb. Pr. N. S. 292, 7 Robt. 25; *Giraudat v. Korn*, 8 Daly, 406; *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497.

**Woods v. Young*, 4 Cranch, 237, 2 L. ed. 607; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48; *Thompson v. Selden*, 20 How. 194, 15 L. ed. 1001; *Crump-ton v. United States*, 138 U. S. 361, 34 L. ed. 958, 11 Sup. Ct. Rep. 355; *Cox v. Hart*, 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Richmond R. & Electric Co. v. Dick*, 8 U. S. App. 99, 52 Fed. Rep. 379, 3 C. C. A. 149; *Davis v. Patrick*, 12 U. S. App. 629, 57 Fed. Rep. 909, 6 C. C. A. 632; *Drexel v. True*, 36 U. S. App. 611, 74 Fed. Rep. 12, 20 C. C. A. 265; *Baker v. Tewarkana Nat. Bank*, 41 U. S. App. 185, 74 Fed. Rep. 598, 20 C. C. A. 545. And in *Bradshaw v. Stott*, 7 App. D. C. 276, it was con-tended that the rigor of the old rule had been so modified as to allow a review on appeal of a refusal in case of abuse of discretion by the trial court, resulting in material injury; but the court refused to pass on the question, because, as they said, there clearly had been no abuse of dis-cretion in that case.

*In *Earnshaw v. United States*, 146 U. S. 60, 36 L. ed. 887, 13 Sup. Ct. Rep. 14, it was conceded by the court that there might be cases in which re-fusal of a continuance, where a clear case was made out entitling the applicant to it, would be such abuse of discretion as would work a rever-sal of the judgment; but the court refused to disturb the judgment in that case, holding that refusal under the circumstances disclosed was no abuse of discretion. So, in later cases the court lays down the more liberal rule, that the trial court's ruling on an application for postpone-ment will be reviewed if it be clearly shown to have abused its discretion, resulting in material injury. *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186; *Isaacs v. United States*, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

**Wooldridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708.

In *Shaler & H. Quarry Co. v. Campbell*, 53 Conn. 327, 2 Atl. 755, the court said: "It is a well-settled rule that all questions of adjournment or of the continuance of a case, where there is no provision of statute deter-mining the matter, are questions for the discretion of the court and can-not be made the subjects of error. . . . In the absence of conduct on the part of the triers that indicates corruption or fraud, or a preju-dice or unfairness that is equivalent to fraud, their action in the matter is final and cannot be reviewed."

For further illustrative cases, see *Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Trammell v. Hudmon*, 86 Ala. 472, 6 So. 4; *Lowering v. State*, 98 Ala. 45, 13 So. 498; *Banks v. Gay Mfg. Co.* 108 N. C. 282, 12 S. E. 741; *Dial v. Valley Mut. Life Asso.* 29 S. C. 560, 8 S. E. 27; *Soper v. Manning*, 158 Mass. 381, 33 N. E. 516; *Kittredge v. Russell*, 114 Mass. 67; *State v. Briggs*, 27 S. C. 80, 2 S. E. 854; *State v. Lucker*, 40 S. C. 549, 18 S. E. 797; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *San Antonio & A. P. R. Co. v. Manning* (Tex. Civ. App.) 50 S. W. 177; *Dimmit County v. Op-*

penheimer (Tex. Civ. App.) 42 S. W. 1029; *Richardson v. Wright*, 58 Vt. 367, 5 Atl. 287.

¹See *supra*, §§ 15 *et seq.*

Necessity of exception.—And in those jurisdictions recognizing the decision of the lower court as reviewable, an exception thereto is necessary before a review can be had.¹

¹*Corn Exch. Bank v. Schuttleworth*, 99 Iowa, 536, 68 N. W. 827; *Burke v. Ward*, 50 Ill. App. 283; *State v. Brodden*, 47 La. Ann. 375, 16 So. 874; *Staples v. Arlington State Bank*, 54 Neb. 760, 74 N. W. 1066; *Moss v. Katz*, 69 Tex. 411, 6 S. W. 764; *McGregor v. Skinner* (Tex. Civ. App.) 47 S. W. 398; *Brennan v. Front Street Cable R. Co.* 8 Wash. 363, 36 Pac. 272.

And a motion to set aside a verdict rendered at a subsequent term is insufficient. *Whaley v. Cooper*, 82 Ga. 72, 8 S. E. 870.

Preservation of exception.—And generally to obtain a review on appeal, the bill of exceptions must preserve the application, the ruling thereon, and the exception to the ruling, and must be incorporated in the record on appeal.¹

¹*Chicago & E. I. R. Co. v. Goyette*, 133 Ill. 21, 24 N. E. 549; *Hoskins v. Hight* (Ala.) 11 So. 253; *State v. Jones*, 134 Mo. 254, 35 S. W. 607.

And the correctness of the ruling will be presumed where a material portion of the moving evidence is omitted from the record. *Ostler v. State*, 3 Ind. App. 122, 29 N. E. 270. See also *Holden v. Brimage*, 72 Miss. 228, 18 So. 383. Or where no evidence in support of the facts relied on is preserved. *Eddie v. Eddie*, 138 Mo. 599, 39 S. W. 451; *Long v. Behan* (Tex. Civ. App.) 48 S. W. 555. Or where the grounds of the application are not shown by the record except in the motion for a new trial. *Ballew v. Casey* (Tex.) 9 S. W. 189. But see *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380, reviewing an exception when made part of a record and when it was one of the grounds of a motion for a new trial.

So, also, the propriety of terms of refusal will not be considered on appeal where the record does not show that appellant had a meritorious defense. *Hefling v. Van Zandt*, 60 Ill. App. 662, Affirmed in Part and Reversed in Part in 162 Ill. 162, 44 N. E. 424.

Specification of error—sufficiency.—The assignment of error should specify the ruling complained of with sufficient definiteness to present it for review.¹

¹The assignment of error in overruling appellant's motion for a continuance is insufficient where there are two separate and distinct rulings upon such motions. *May v. State*, 140 Ind. 88, 39 N. E. 701.

In Kansas the propriety of a refusal is presented for review in the court of appeals by an assignment of error to the overruling of the motion for a new trial, one of the grounds of which motion was in proceeding with the trial while the case was pending and undetermined in the supreme court "as set forth in said defendant's motion for a continuance." *Topeka v. Smelser*, 5 Kan. App. 95, 48 Pac. 874.

And to obtain a review of a ruling on application to postpone, the judgment must be final for purposes of appeal.¹

¹Thus, a writ of error will not lie to an order granting a continuance where the cause is still pending in the lower court. *Carter v. Rome & C. Constr. Co.* 89 Ga. 158, 15 S. E. 36.

So of an appeal when the judgment on the merits is not appealed from. *Newman v. Wildenstein*, 42 La. Ann. 925, 8 So. 607.

So, denial of a motion to strike a cause from the calendar is equivalent to refusal of a continuance, and is not appealable. *Whitefoot v. Leffingwell*, 90 Wis. 182, 63 N. W. 82.

And in South Carolina an order for a continuance does not "involve the merits" or "affect the substantial rights" so as to be appealable. *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159.

Refusal of trial court to grant postponement may be reviewed on motion for new trial, or by general term, on appeal from order; but it cannot be reviewed by court of appeals on appeal from judgment on verdict. *Smith v. Alker*, 102 N. Y. 87, 5 N. E. 791.

No appeal lies directly to the general term of the city court of New York from an order denying a postponement of a trial, by a defendant who withdraws therefrom, but the proper course is to make a nonenumerated motion at special term to set aside such decision. *McKeon v. Kellard*, 6 Misc. 31, 26 N. Y. Supp. 72. But an appeal lies to the general term from an order granting an adjournment if illegal conditions are imposed. *Kennedy v. Wood*, 54 Hun, 14, 7 N. Y. Supp. 90.

In Canada, a judgment on a contested application by a legatee to continue a suit to set aside a deed is final as a determination of the right to continuance, and therefore appealable to the supreme court. *Baptist v. Baptist*, 21 Can. S. C. 425.

37. Postponements by agreement or consent.

A cause may be postponed by agreement of the parties, acting for themselves or through counsel, and with the consent of the court.¹ And some courts provide in their rules that no cause on the trial list shall be postponed more than once by consent of counsel or parties.² And the agreement should be reduced to writing.³ But an agreement to postpone will not always be enforced,⁴—especially if its enforcement will work prejudice.⁵

¹*Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906, holding such consent of court necessary.

A stipulation that if for any reason either party cannot attend on the day set for trial, the trial shall be postponed, does not require action by the justice, but in the absence of one party the other is to continue it by force of the agreement; and the word "party" includes counsel. *Standard Granite Co. Quarries v. Aikey*, 67 Vt. 116, 30 Atl. 806.

It will not be presumed that counsel was present and acquiesced in the continuance unless the record contains statements expressly to that effect. *Dickinson v. Mann*, 74 Ga. 217. But an order to postpone, granted on the court's misunderstanding induced by counsel's statement asking therefor, that opposing counsel consented thereto, is properly set aside, though the latter is in court when the postponement is asked, unless he heard the statement and made no objection thereto. *Hunt v. Listenberger*, 14 Ind. App. 320, 326, 42 N. E. 240.

A defendant who, with plaintiff's consent, obtains a postponement for more than ninety days, under the Nebraska Code, cannot, on the day to which adjournment was had, demand a dismissal of the action. *Fischer v. Cooley*, 36 Neb. 626, 54 N. W. 960.

²So provided by rule of court of the common pleas of Lancaster county, Pennsylvania. And in *Schrimpton v. Bertolet*, 155 Pa. 638, 26 Atl. 776. it was held that the necessary meaning of this rule was that the court must grant at least one continuance if both parties consent, and that a refusal, which forces parties to trial without witnesses, and is in violation of this rule, is reversible error.

³So required by a rule of court in Alabama. *Collier v. Falk*, 66 Ala. 224. See also *Griswold v. Lawrence*, 1 Johns. 507; *Peralta v. Mariea*, 3 Cal. 185.

⁴As, an alleged oral agreement made out of court, the evidence leaving it uncertain whether the agreement was really made. *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930.

⁵Thus, an agreement between counsel, made without the consent of one of the parties, will be set aside by the court in its discretion when enforcement of the agreement will result in serious injury to one of the parties and the other will not be prejudiced by its being so set aside. *McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552.

38. Postponements by operation of law.

Undisposed-of cases on the docket at the end of a term are, however, by operation of law, continued to the next term without a special order.¹

But an order of the court, on its own motion, continuing to the next term all cases undisposed of, may be set aside a few minutes later and the cases ordered for trial at that term.²

¹*Harrison v. Com.* 81 Va. 491; Va. Code, chap. 161, § 16; *Poyer v. Desplaines* (Ill.) 13 West. Rep. 508, 15 N. E. 768; *Horn v. Excelsior Springs Co.* 52 Mo. App. 548; *Strickler v. Foegel*, 40 Neb. 773, 59 N. W. 384. And causes on the short-cause calendar in Cook county, Illinois, circuit court

may be so continued from day to day if necessary to dispose of them for trial. *Armstrong v. Crilly*, 152 Ill. 646, 38 N. E. 936.

So, in West Virginia, a cause before a justice stands over for one week and from week to week until disposed of on the nonappearance of the justice at the hour set; and a judgment rendered by another justice called in by one party after the hour has expired, without notice to the other party, is void and will be set aside on certiorari. *Parsons v. Aultman, M. & Co.* (W. Va.) 31 S. E. 935.

¹*Lamont v. Williams*, 43 Kan. 558, 23 Pac. 592, sustaining such action by the trial court, and holding that jurisdiction and control over the case is not lost by the first order.

Postponement to legal holiday.—A postponement to a day on which the court is prohibited from transacting business,—as Sunday or a legal holiday,—will extend to the first day thereafter on which it can legally transact business.¹

¹*State ex rel. Carter v. King*, 23 Neb. 540, 37 N. W. 310. And a motion returnable on Labor Day, which by New York laws is made a legal holiday, stands over as of course until the next day, in the absence of a judge on that day. *Berthold v. Wallach*, 14 Misc. 55, 35 N. Y. Supp. 208.

But under a Wisconsin statute prohibiting the opening of court or transacting of business, except to instruct or discharge a jury or receive a verdict and render judgment thereon, a justice of the peace has no power to further adjourn a cause on Thanksgiving Day, to which day it had been previously adjourned by consent of parties; and a judgment rendered on the last adjourned day is void. *Milwaukee Harvester Co. v. Teasdale*, 91 Wis. 59, 59 N. W. 422. So, also, under a South Dakota statute. *Leonoso v. Bartilino*, 7 S. D. 93, 63 N. W. 543.

39. Postponements by justices of the peace.

In most states the postponement of causes before justices of the peace is regulated by statute;¹ and a postponement granted before the time allowed by statute,² or for a time in excess of the statutory period,³ or exceeding the number of postponements allowed,⁴ is unauthorized and ousts the justice of jurisdiction to further proceed with the cause, unless the postponement was expressly agreed to by the parties.⁵

¹Thus, under a Kansas statute, a party is entitled of right to a continuance for any desired number of days not exceeding fifteen on filing the required affidavit. *Cook v. Larson*, 47 Kan. 70, 27 Pac. 113.

In West Virginia defendant in an action before a justice of the peace who, on the return day, makes oath that he has a just defense, is entitled to continuance for seven days. *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25. But a mayor, before whom is returnable an order issued on

a petition to the council to show why a merry-go-round should not be abated as a nuisance, is not a justice of the peace within the meaning of the Code of West Virginia, allowing causes before justices to be postponed seven days, and his refusal to so postpone is not error. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

In Nebraska, continuance of a cause before a justice for not to exceed thirty days will be granted on the applicant proving, as required by the Code, by his own oath or otherwise, that he cannot, for want of material evidence expected to be produced by him, safely proceed to trial. *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78; *Coombs v. Brenklander*, 29 Neb. 586, 45 N. W. 929. But not when he has already had one continuance of seventeen days by consent of the other party; he must then satisfy the justice by oath or otherwise, as required by another statute, of his inability to go to trial before the time asked for want of material evidence, describing it; that the delay is not from any fault of his, and that he expects to procure the testimony. *Moran v. McCullum*, 50 Neb. 449, 69 N. W. 938.

*Thus, jurisdiction is lost by an adjournment on the return day after both parties have appeared, but before issue is joined. *Duel v. Sykes*, 59 Hun, 117, 13 N. Y. Supp. 166. Or where plaintiff does not appear or put in a complaint on the return day, and defendant appears and demands dismissal because of plaintiff's failure to appear. *Todd v. Doremus*, 60 Hun, 385, 15 N. Y. Supp. 470.

**Holden v. McCabe*, 21 Pa. Co. Ct. 41.

So, in Iowa, an adjournment for three days from the return day without defendant's consent, in violation of the Code, divests the justice of jurisdiction; and verbal notice of the adjournment given by plaintiff to defendant's agent will not restore the jurisdiction. *Iowa Union Teleph. Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122.

But the New York statute restricting the right of the justice of the New York city municipal court to grant adjournments to a period "not exceeding ninety days from the return of the summons" applies to the period of each particular adjournment asked, and is not violated so as to oust the court of jurisdiction because the aggregate time of all adjournments granted on application of either party exceeds the prescribed limit. *First Nat. Bank v. Smith*, 24 Misc. 709, 53 N. Y. Supp. 795.

And an adjournment for three days does not divest the justice of jurisdiction to hear the case on the return day because he omitted to state in his docket on whose motion the adjournment was had, where there is no general appearance by defendant, and plaintiff on the return day appears and files his complaint. *Wheeler v. Paterson*, 64 Minn. 231, 66 N. W. 964.

*Thus, a third adjournment without cause shown, after two previous adjournments for cause, ousts jurisdiction. *State v. Gust*, 70 Wis. 631, 35 N. W. 559.

And under the New York Code of Civil Procedure a second adjournment without consent of both parties ousts the court of jurisdiction. *Morris v. Hays*, 24 App. Div. 8, 43 N. Y. Supp. 639. Although payment of the

objecting party's witness fees is imposed as a condition. *Newman v. Woodcock*, 16 Misc. 142, 38 N. Y. Supp. 957.

So, in Wisconsin, a second adjournment in the absence of, and without consent of, defendant, and without the oath or affidavit required, deprives a justice of jurisdiction under a statute prohibiting more than one adjournment unless the applicant shall satisfy the justice by oath that he cannot safely proceed to trial for want of material evidence, although the justice assigns, as one of the reasons for the adjournment, his own illness, as another statute requires transference of the case to another justice in case of illness. *Gallager v. Serfling*, 92 Wis. 544, 66 N. W. 692.

**Stoutenburg v. Humphrey*, 9 App. Div. 27, 41 N. Y. Supp. 140.

And under the Washington Code prohibiting postponement for a period exceeding sixty days, jurisdiction is lost where the adjournment exceeds sixty days and the docket entry fails to show that it is by consent of both parties. *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539.

And in Iowa a finding shown by the justice's record, that an adjournment of three days, in violation of the Code, was with consent of the parties, when in fact defendant had not consented, is not conclusive on the latter; and a subsequent default judgment against him is void. *Iowa Union Teleph. Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122.

In Minnesota an adjournment of one hour by consent of both parties when the pleadings are closed is proper, although, under the statute, an adjournment for more than six days without such consent is improper. *Caley v. Rogers*, 72 Minn. 100, 75 N. W. 114. See also *West v. Berg*, 66 Minn. 287, 68 N. W. 1077.

And in New York jurisdiction is not lost by an adjournment for the time agreed on by the parties after mistrial, which had been demanded by plaintiff alone, and without issuing a new venire, as required by the Code of Civil Procedure, where the plaintiff waives his right of trial by jury and defendant's attorney states that he does not demand a jury trial, although he does state that he wants the case tried according to law. *Suiter v. Kent*, 12 App. Div. 599, 43 N. Y. Supp. 137.

According to *Johnson v. Hagberg*, 48 Minn. 221, 50 N. W. 1037, an adjournment beyond the statutory limitation under a stipulation of the parties made and filed before the adjourned day, for further adjournment, if an irregularity, is an immaterial one, and the loss of jurisdiction is waived by the stipulation.

And the *undertaking* required by a Nevada statute to procure a continuance or adjournment is not necessary where the cause is adjourned, though beyond the statutory period, by consent of the parties. *Nevada C. R. Co. v. Lander County Dist. Ct.* 21 Nev. 409, 32 Pac. 673.

So, too, failure to specify the *time*¹ and *place*² to which the cause is adjourned divests him of jurisdiction.

¹Thus, a justice loses jurisdiction by an adjournment without a fixed day on a verbal agreement by the parties to agree on the day, and that in case
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of their failure so to do the justice may appoint a day. *Bonney v. Paul*, 39 N. Y. S. R. 596, 15 N. Y. Supp. 442.

²*Fitzhugh v. Rivard*, 109 Mich. 154, 66 N. W. 947.

But merely *holding open* a cause for a few hours to allow defendant to appear,¹ or from day to day in order to perform other official duties,² will not work a loss of jurisdiction.

¹*Steele v. Wells*, 56 N. Y. Supp. 367.

²*Woempener v. Ketchum*, 110 Mich. 34, 67 N. W. 1106 (holding that "holding open" is not technically an adjournment, within the meaning of Howell's Annotated Statutes, even though it is so called on the docket, and that it is not within the provision of a statute requiring the docket to show adjournments and the place to which they are made).

II.—IMPANELING THE JURY.

[The statutes abrogating resort to triers, and leaving it to the judge to determine all causes of challenge, do not, without more, abrogate the distinction between challenges for principal cause and challenges to the favor. In the former class, if the fact suggested be established, incompetency is an inevitable conclusion of law; in the latter, incompetency is a mere question of fact.]

The application of the following rules should be guided by the recognized principles that, in the absence of statute to the contrary: (1) A court of general jurisdiction, finding the statutory means of providing a jury inadequate, may fall back on its common-law powers; (2) an unfit juror may be set aside on a just objection, though the statutes do not provide for the case; and (3) the judge may properly interpose of his own motion, when necessary to secure a fit and impartial jury.]

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| 1. The right to challenge. | 14. — conversations with party. |
| 2. Interrogating the jurors. | 15. — prejudice. |
| 3. Evidence <i>aliunde</i> . | 16. — litigation. |
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qualifications. | 18. —time for challenging. |
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extent of right. |
| 9. — dependence of juror on party. | 22. — order of. |
| 10. — — of party on juror. | 23. — when interposed. |
| 11. — acquaintance. | 24. — same. |
| 12. — opinion. | 25. —number of. |
| 13. — opinion as to incidental ques-
tion. | 26. Court may set aside juror. |

1. The right to challenge.

The right to challenge jurors for a cause assigned, as distinguished

from peremptory challenge, is a common-law right which cannot be taken away except by express statute.¹

¹*Barrett v. Long*, 3 H. L. Cas. 395, 415. But see *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634, where the court say: "It is not necessary that the statute should contain a provision that a challenge for cause may be allowed. It exists in all cases where the jury impaneled is a common-law jury, and a party cannot be deprived of this right by statute."

2. Interrogating the jurors.

Each party has the right before the jury is sworn to interrogate each proposed juror under oath,¹ or to have the court do so,² on points material to the question whether he has the qualifications required by law and is impartial.³

¹To determine the competency of a juror an oath is administered to him, and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344, 18 N. W. 73.

But that jurors were not so sworn cannot be objected to on appeal in the absence of an exception to impaneling them, and it is not even stated that they were not qualified, or that appellant was in fact prejudiced, and it does not appear when his counsel first knew of the omission. *Preston v. Hannibal & St. J. R. Co.* 132 Mo. 111, 33 S. W. 783.

It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either for cause or peremptorily. And a juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, which is prejudicial to the party. And the injury done cannot be repaired by a subsequent statement correcting the untruthful answer. *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

²In Alabama, neither party has the right to so examine, but the examination must be made by the judge. *Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705.

That the court participated in the examination of jurors is not cause for reversal where appellant examined them as much as he desired, and accepted those who tried the case. *Kessel v. O'Sullivan*, 60 Ill. App. 548.

But the fact that the court had, in order to test their disinterestedness, put questions to the jurors as a whole, after the completion of the panel, to which no juror responded, cannot deprive a party of his right to interrogate the jurors for the same purpose by the same or a similar line of questioning. *American Bridge Works v. Pereira*, 79 Ill. App. 90.

³*Hull v. Albro*, 2 Disney (Ohio) 147, 149; *Loeffler v. Keokuk Northern Line Packet Co.* 7 Mo. App. 185; *Gilliam v. Brown*, 43 Miss. 641. Other

cases in note to *State v. Crank*, 23 Am. Dec. 131. See also *Paducah, T. & A. R. Co. v. Muzzell*, 95 Tenn. 200, 31 S. W. 999; *Holton v. Hendley*, 75 Ga. 847. *Contra*, in South Carolina, *State v. Crank*, 2 Bail. L. 66, 23 Am. Dec. 117.

Interrogating as to general opinions of a juror's duties was held not allowed even for the purpose of ascertaining if the juror is "of sound judgment and well informed," as required by statute, in *Pennsylvania Co. v. Rude*, 100 Ill. 603.

Whether questions propounded to veniremen on such examination were properly excluded is immaterial, where none of them so questioned were accepted, and appellant had not exhausted his peremptory challenges, and it does not appear that he sought to so question those afterward accepted. *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 68 Ill. App. 125.

Great latitude is allowed in exercising this right of examination of a juror, and if it appears probable that he is not indifferent he is excluded.¹ But its scope and the pertinency of the questions propounded are discretionary with the trial judge, to be determined from the nature of the case on trial.² And it is for the court to say what evidence is admissible on the question of impartiality.³

¹*State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411. And see *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98, and cases cited.

But it is error to permit counsel to enlarge on his side of the case, and, under pretense of such an examination, set out what he claims he will prove, so as to prejudice the jurors before they are sworn. *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099.

²*Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295. And for further illustrations see cases in notes following.

³*Smith v. Floyd*, 18 Barb. 522.

This right extends to facts not in themselves disqualifying if, in connection with others, they might show bias;¹ or to facts which might so affect the juror's mind as to create bias or prejudice.² And even to the fact of prejudice itself,³ though not as to prejudice against crime.⁴

So, the juror may be asked if he has any knowledge of the facts of the case, or whether he has formed any opinion about it;⁵ but not as to his opinion on an assumed state of facts.⁶

But as to the propriety of asking jurors which party they would favor if the testimony were equally balanced, the cases do not agree.⁷

And the juror's relations with parties admitted to be really interested in the suit may be inquired into, though they are strangers to the record;⁸ but it is not proper to ask a juror if he is a debtor of a party.⁹

So, too, a juror may be questioned as to his acquaintance with counsel in the case,¹⁰ or so as to ascertain whether the relation of attorney and client exists between them.¹¹

So, also, the juror's kinship to a party may be inquired into, though it is not within the degree disqualifying him.¹²

And he may be asked if he is a man of family, to enable counsel to advisedly exercise his right of peremptory challenge.¹³

He may be asked as to his membership in secret societies and church organizations.¹⁴

But questions tending to his disgrace¹⁵ or disadvantage¹⁶ cannot be asked the juror.

¹*Mechanics' & F. Bank v. Smith*, 19 Johns. 115.

²*Comfort v. Mosser*, 121 Pa. 455, 15 Atl. 612.

As, in a suit against a railway corporation, it is proper to ask the jury whether the fact that plaintiff was riding on a free pass would influence their verdict. *Jacksonville S. E. R. Co. v. Southworth*, 32 Ill. App. 307, Affirmed, 135 Ill. 250, 25 N. E. 1093.

But to ask a juror whether the testimony of witnesses who profess the Jewish faith would receive as much credit as that of members of any other faith is improper. *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52.

So, too, in an action for services, a juror who has stated that he had difficulty with his employers, touching payment of wages, cannot be asked whether such difficulty would prejudice him against defendant. *Fish v. Glass*, 54 Ill. App. 655.

But where counsel, after all desired questions had been asked by the judge, announced themselves satisfied, and the jurors were drawn according to law, and were competent, the court may properly refuse to permit counsel to examine each individual juror to ascertain his bias. *London & L. F. Ins. Co. v. Rufer*, 11 Ky. L. Rep. 724, 12 S. W. 948.

⁷Thus, *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33, holds that, although not authorized by statute, it is proper to allow jurors to be asked as to prejudice existing in their minds for or against either party, and that refusal is reviewable on appeal. So, *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, holds it proper to ask a juror if he is prejudiced against people professing the Jewish faith; and *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347, holds that defendant may ask jurors whether they are prejudiced against the defense of the statute of limitations, which he has pleaded.

But under a Virginia statute allowing examination of a juror to ascertain if he is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice "therein", a juror cannot properly be asked if he is prejudiced against corporations. *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

⁸*Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 47 N. W. 941.

⁹*Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

**Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Com. v. Van Horn*, 4 Lack. L. News, 63; *Fish v. Glass*, 54 Ill. App. 655.

¹¹In Michigan 'it is held proper. *Otsego Lake Twp. v. Kirsten*, 72 Mich. 1, 40 N. W. 26; *Monaghan v. Agricultural F. Ins. Co.* 53 Mich. 238, 18 N. W. 797. While in Illinois it is not allowed. *Chicago & A. R. Co. v. Fisher*, 38 Ill. App. 33. See *Fish v. Glass*, 54 Ill. App. 655.

**Meyer v. Gundlach-Nelson Mfg. Co.* 67 Mo. App. 389.

**Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. 413.

¹⁰*O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151, 28 N. E. 923.

¹¹*Vandalia v. Seibert*, 47 Ill. App. 477; *Lowe v. Webster*, 19 Ky. L. Rep. 1208, 43 S. W. 217. But refusal to permit the question is not reversible error unless it appears that the verdict was influenced by the relation of attorney and client between opposing counsel and one or more of the jurors. *Lowe v. Webster*, *supra*. And *Northern P. R. Co. v. Holmes*, 3 Wash. Terr. 202, 14 Pac. 688, while recognizing the line of inquiry as legitimate, holds that refusal to allow it was not in that particular instance an erroneous exercise of discretion.

¹²*Tegarden v. Phillips* (Ind. App.) 39 N. E. 212.

¹³*Union P. R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891.

¹⁴*Burgess v. Singer Mfg. Co.* (Tex. Civ. App.) 30 S. W. 1110.

But the pertinency of the question to the particular case is committed to the sound discretion of the trial judge, and its exclusion is not such an abuse as to require reversal, in the absence of prejudice. *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295.

¹⁵*Burt v. Panjaud*, 99 U. S. 180, 181, 25 L. ed. 452; *Mechanics' & F. Bank v. Smith*, 19 Johns. 115; *People v. Fuller*, 2 Park. Crim. Rep. 16; *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721, 28 S. E. 246.

¹⁶3 Bl. Com. 363.

3. Evidence aliunde.

A witness may be called to prove the ground of challenge.¹

¹*Pringle v. Huse*, 1 Cow. 432; *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451. But compare *Hughes v. People*, 116 Ill. 330, 6 N. E. 55.

4. Exception.

An exception lies to the admission or exclusion of evidence under either of the preceding rules. But to render available the exclusion of evidence it must appear that the party had exhausted his peremptory challenges,¹ or that he was prevented from ascertaining whether the juror had such bias or prejudice as would influence his verdict.²

¹*Grand Lodge I. O. of M. A. v. Wieting*, 68 Ill. App. 125, Affirmed in 168 Ill. 408, 48 N. E. 59. And in *Ford v. Cheever*, 113 Mich. 440, 71 N. W. 837, such exclusion was held no ground for appeal where the juror was per-

emptorily excused by the party asking the question, who, without examining other jurors, announced himself as satisfied with the jury.

²*Southern P. Co. v. Rauh*, 7 U. S. App. 84, 1 C. C. A. 416, 49 Fed. Rep. 696; *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33.

5. Grounds of challenge; general disqualifications.

General disqualification for jury service will support a challenge for cause,—as, for instance, conviction of infamous crime.¹ So, where there is doubt as to the juror's being an elector of the county.² And by statute in some states previous service as a juror in the same court within a designated time,³ or being a party interested in a suit pending and at issue at the term of the court for which he is summoned,⁴ is ground of challenge for cause. So, at least in one state, is ignorance of the English language.⁵ But a very imperfect knowledge of the law applicable to the case is not.⁶ Nor is the fact that the juror is exempt from jury duty ground of challenge for cause.⁷

¹*Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341 (S. C. Const. art. 5, § 22, and art. 2, § 6, and Rev. Stat. 1893, §§ 2377, 2379, 2406). But an unsigned information charging crime, filed fifteen years before, will not disqualify. *Missouri, K. & T. R. Co. v. Burrough* (Tex. Civ. App.) 46 S. W. 403. But failure to object on this ground, though the fact was known before the cause was submitted to the jury, waives that objection. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

²Even though on *voir dire* he brings himself within the statutory qualification, where no complaint is made that a fair jury was not obtained. *Omhaa & R. Valley R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

The South Carolina Constitution requires jurors to be qualified electors as provided therein; and they must also be registered, registration being a qualification for suffrage. *Mew v. Charleston & S. R. Co.* 55 S. C. 90, 32 S. E. 828.

In California, jurors, to be competent, must have been assessed on the last assessment roll of the county or city on property belonging to them; and an assessment of the property to two persons is one against each so as to qualify each within the Code requirement. *People v. Owens*, 123 Cal. 482, 56 Pac. 251.

³2 Kansas Gen. Stat. 1897, chap. 24, § 3; Hill's (Colo.) Anno. Stat. 1891, § 2595 (one year); Ind. Rev. Stat. § 1395 (one year); Neb. Code, § 665 (two years); Vt. Stat. 1884, chap. 111, § 1 (two years). And see statutes of other states for similar provisions.

Under the Kansas statute, service on an earlier case during the same term will support a challenge for cause. *Atchison, T. & S. F. R. Co. v. Snedeger*, 5 Kan. App. 700, 49 Pac. 103.

But under the Colorado statute previous service within the designated time in the county court will not support a challenge in the district court. *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284.

Talesmen are also subject to the Nebraska statute. *Wiseman v. Bruns*, 36 Neb. 467, 54 N. W. 858.

But not to the Vermont statute. *First Nat. Bank v. Post*, 66 Vt. 237, 23 Atl. 989.

Under a Mississippi statute talesmen who have served at the same or last preceding term in as many as three cases are disqualified; but this statute does not apply to a juror who is a member of the regular panel for the week. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360.

And the Indiana statute, making it unlawful to select any person who has served during the year immediately preceding, applies to a talesman who has served as such in the same court some days before during the same term. *Goshen v. England* (Ind.) 21 N. E. 977.

*N. C. Code, § 1728. But a juror interested as a creditor in a fund for which a receiver has sued is not a party within this statute. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308. And see various other codes and statutes.

*Thus, by statute, in Michigan (How. Anno. Stat. § 755). See *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690, 35 N. W. 162. *Contra, Re Allison*, 13 Colo. 525, 22 Pac. 820.

**Union P. R. Co. v. Motzner* (Kan. App.) 55 Pac. 670.

**Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41; *Brown v. State* (Fla.) 25 So. 63; *People v. Rawn*, 90 Mich. 377, 51 N. W. 522 (because juror over age); *People v. Owens*, 123 Cal. 482, 56 Pac. 251 (exemption under Cal. Code Civ. Proc. § 200, to persons holding county, city, or township offices).

6. — interest.

An interest in the result of the action disqualifies.¹ Membership in a corporation which is a party is an interest within this rule.²

At common law this is ground of a challenge for principal cause.

¹*Wood v. Stoddard*, 2 Johns. 194; *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128; And see *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98, and authorities there cited.

But the fact that a juror is surety on a prosecution bond of plaintiff in a similar action against the same defendant does not disqualify. *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193.

It is not necessary to show a pecuniary interest; for a trustee of a charitable society serving without compensation and having no possible pecuniary benefit from its recovery in the action, would be incompetent. And members of a law and order league, who are contributors to the expense of a prosecution under the liquor excise law, are disqualified. *Jackson v. Sandman*, 45 N. Y. S. R. 633, 18 N. Y. Supp. 894.

But not an interest merely in the legal questions involved, without an interest in the result of the cause. See *Williams v. Smith*, 6 Cow. 166; *Miller v. Wild Cat Gravel Road Co.* 52 Ind. 51, 59. But compare *Lewis v. Few*, Anthon, N. P. 75, where it was properly held that a person present and acting at a political meeting was not competent as a juror in

an action between other persons for a libel contained in an address adopted at the meeting; and *Jefferson County v. Lewis*, 20 Fla. 980, where a holder of similar county bonds to those sued on was held disqualified. But the interest which one has in an action by another to recover for services, because his own right to recover depends on the authority of the agent who employed plaintiff, is not such as to disqualify a relative as a juror, under the Arkansas statute. *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907.

²As, membership in a corporation owning stock in another corporation, which is a party. *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851. But membership in a corporation does not disqualify in an action to which a corporation is not a party, merely because a servant of the corporation is the defendant, if the case be such that there could be no benefit to a recovery over against the corporation. *Williams v. Smith*, 6 Cow. 166.

So, even where, as in a religious corporation, the membership is only the beneficial interest of one of the denomination in the administration of the trust represented by the trustee. *Cleage v. Hyden*, 6 Heisk. 73. Judgment reversed for error in refusing to exclude members of the Methodist Episcopal Church Society in action by the plaintiffs as trustees of that church.

This is on account of interest, not religious opinion; for that does not disqualify (*Cleage v. Hyden*, *supra*), unless amounting or leading to bias in the particular case. But the fact that the juror is a fellow member with a party, in a corporation or society,—as, for instance, the Masons,—is only ground for challenge to the favor; that is, it raises only a question of actual bias in the particular case. *Purple v. Horton*, 13 Wend. 9, 23, 27 Am. Dec. 167.

7. — citizen of municipality.

At common law, and also under statutes declaring interest a disqualification, a citizen and taxpayer in a town, city, or other municipality is disqualified in an action in which it is a party,¹ unless it is otherwise provided by statute.²

At common law this is a ground of challenge for principal cause. If the relation exists the disqualification is absolute.

¹*Day v. Savage*, Hobart, *85, Am. ed. 212; *Bailey v. Trumbull*, 3 Conn. 581, 583, *dictum*; *Robinson v. Wilmington*, 8 Houst. (Del.) 409, 32 Atl. 347; *Russell v. Hamilton*, 3 Ill. 56 (where an officer was the nominal party for benefit of township); *Hearn v. Greensburgh*, 51 Ind. 119; *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977; *Cramer v. Burlington*, 42 Iowa, 315, 318; *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192; *Gibson v. Wyandotte*, 20 Kan. 156; *Hawes v. Gustin*, 2 Allen, 402; *Eberle v. St. Louis Public Schools*, 11 Mo. 247; *Fine v. St. Louis Public Schools*, 30 Mo. 166, 173; *Omaha v. Cane*, 15 Neb. 657, 20 N. W. 101; *Peck v. Essex County Freeholders*, 21 N. J. L. 656; *Diveny v. Elmira*, 51 N. Y. 506; *Wood v. Stoddard*, 2 Johns. 194; N. Y. Code Civ. Proc. § 1179; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Guthrie v. Shaffer*, 7 Okla.

459, 54 Pac. 698; *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33; *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420. *Contra*, *Kemper v. Louisville*, 14 Bush, 87; *Kentucky Wagon Mfg. Co. v. Louisville*, 97 Ky. 548, 31 S. W. 130; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

But the city itself cannot challenge a juror for this cause. *Conklin v. Keokuk*, 73 Iowa, 343, 35 N. W. 444.

In the city of New York, which is coextensive with the county, the objection is waived or ignored from necessity.

*General statutes in various jurisdictions, as well as special charter provisions, create numerous peculiar exceptions to this rule. Thus, in the city of New York, liability to pay taxes in a city, county, or town does not disqualify in a *penal* action. N. Y. Code Civ. Proc. § 1179. Residence does not disqualify in an action in which a county is *interested*. N. Y. Rev. Stat. 384, § 4. Nor in an action in which a town is *interested unless the proceeding is by or against the town*. N. Y. Rev. Stat. 357, § 4. Nor does residence or liability to taxation in a village incorporated under the general act. N. Y. Laws 1870, chap. 291, title 8, §§ 9, 28; 2 N. Y. Rev. Stat. 7th ed. 904; N. Y. Code Civ. Proc. § 1179. And by the charter of Troy, residents and taxpayers of that city are competent, if not otherwise disqualified; and exclusion for that reason alone is reversible error. *Hildreth v. Troy*, 101 N. Y. 234, 4 N. E. 559.

So, a Texas statute expressly provides that residents of a county suing or sued may be jurors, if otherwise competent and qualified according to law; and they cannot be challenged on this ground under another statute forbidding generally a person interested directly or indirectly from sitting. *Watson v. Dewitt County* (Tex. Civ. App.) 46 S. W. 1061. See also *Marshall v. McAllister*, 18 Tex. Civ. App. —, 43 S. W. 1043; *Missouri, K. & T. R. Co. v. Bishop* (Tex. Civ. App.) 34 S. W. 323.

And see *dictum* in *Johnson v. Wakulla County*, 28 Fla. 720, 9 So. 690 (Laws 1870, chap. 18, § 17).

And so by statute in Pennsylvania. And this statute also extends the exemption of this disqualification to members of city council, etc. And their exclusion on this ground alone is reversible error. *Scranton v. Gore*, 124 Pa. 595, 17 Atl. 144.

So, also, in Michigan. 1 How. Anno. Stat. § 466. See *Smith v. German Ins. Co.* 107 Mich. 270, 30 L. R. A. 368, 65 N. W. 236, recognizing the power of the legislature to so provide.

But the fact that a statute removes this disqualification does not go to the extent of qualifying them to serve where they are parties or quasi parties to the proceeding to be investigated, and which they induced the corporation to institute; and their participation subjects them to the imputation of bias in favor of one and prejudice against the other party. Thus, in Georgia, petitioners for a new road over the land of another are, when objected to, incompetent to sit as jurors on the question of damages between the county and the landowner. *Almand v. Rockdale County*, 78 Ga. 199. And in Pennsylvania members of a city council are properly rejected in an action against the city on a claim which has been presented to them and disallowed. *Lancaster County v. Lancaster*, 170 Pa. 108, 32 Atl. 567.

8. — relationship.

Relationship by consanguinity or affinity¹ to a party, or to one who is disqualified by interest, direct or indirect,² disqualifies.

At common law this disqualification extends to those in the ninth degree,³ and no further. By statute in some states it extends to the sixth;⁴ in others to the fourth.⁵

At common law this is ground of challenge for principal cause.

¹*Williamson v. Mayer Bros.* 117 Ala. 253, 23 So. 3; *Buddee v. Spangler*, 12 Colo. 216, 20 Pac. 760; *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905; *Davidson v. Wallingford* (Tex. Civ. App.) 30 S. W. 286, 287; *Mahancy v. St. Louis & H. R. Co.* 108 Mo. 191, 18 S. W. 895. Compare *Central R. & Banking Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315.

The affinity must be one subsisting at the time. If, upon a death in the line, issue do not survive, the affinity is severed. *Cain v. Ingham*, 7 Cow. 478, and note. After which it is only a circumstance to be considered on the question of actual bias as a ground of challenge to the favor.

Relationship to a plaintiff in a former action, whose judgment, which has been paid in full, is the basis of the present action, and who appears in the present action as a witness only, does not disqualify. *Faith v. Atlanta*, 78 Ga. 779, 4 S. E. 3.

*Thus, relationship to counsel or attorney, whose fees depend on a recovery, disqualifies equally as relationship to a party. *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128. But see *Fait & S. Co. v. Truxton* (Del.) 39 Atl. 457, accepting as juror a nephew of one of the counsel.

So, of relationship of a juror as son of a stockholder in a corporation party. *Georgia R. Co. v. Hart*, 60 Ga. 550.

So, it seems, of relationship to an inhabitant of a city or town which is a party. *Day v. Savage*, Hobart, 85, Am. ed. 212; *Bailey v. Trumbull*, 31 Conn. 581, 583, *dicta*.

*3 Bl. Com. 363. Recognized in *Wirebach v. First Nat. Bank*, 97 Pa. 543, 552, and in *Cain v. Ingham*, 7 Cow. 478. Coke speaks of relationship without limit as to degree.

In South Carolina, where there is no statute fixing the degree within which a juror is disqualified, the question whether the relationship is such as would be likely to render the juror not indifferent is left to the trial judge to determine. *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905, and cases cited.

*Me. Rev. Stat. chap. 1, § 6, rule 22; N. Y. Code Civ. Proc. § 1166; Ind. Rev. Stat. 1894, § 240. See *Tegarden v. Phillips* (Ind. App.) 39 N. E. 212.

The Maine statute provides, however, that the parties may, by written consent, waive the objection. But allowing a juror so disqualified to sit is ground for new trial, though neither the parties nor the juror knew of the relationship until after verdict. *Jewell v. Jewell*, 84 Me. 304, 18 L. R. A. 473, 24 Atl. 858.

The degree is ascertained by ascending from the juror to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the juror and party and excluding the common ancestor. N. Y. Code Civ. Proc. § 46. Generally, however, in this country the mode of computation adopted is that of the civil law, beginning with the juror and ascending to the common ancestor, and then descending to the party, recognizing a degree for each person in both ascending and descending lines. *Kahn v. Reedy*, 8 Ohio C. C. 345. And see statutes of various states.

Mo. Rev. Stat. § 6083; *Price v. Patrons' & Farmers' Home Protection Co.* 77 Mo. App. 236; Ohio Rev. Stat. § 5176. See *Kahn v. Reedy*, 8 Ohio C. C. 345.

9. — dependence of juror on party.

One who is subject to the control¹ of a party,² as, for instance, an employee³ or a tenant,⁴ is disqualified, without evidence of bias.

At common law this is ground of challenge for principal cause.

¹This is the test in this class of cases. Thus, being a guest in an inn for pay, or not shown to be gratuitously so, is not cause for principal challenge, because not a case of a position where one might be subject to control. *Cummings v. Gann*, 52 Pa. 484.

²On general principles one subject to the control of a person interested should be deemed equally disqualified.

And a juror, who stated that his verdict might be influenced by the fact that he was under obligations to one of the parties for favors extended in the past and expected to be extended in the future, and that if the evidence were evenly balanced he would favor the party in question, was held to have been properly excluded upon challenge, in *Denver S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 21 Pac. 708.

³*Hubbard v. Rutledge*, 57 Miss. 7; *Central R. Co. v. Mitchell*, 63 Ga. 173 (holding that at common law all servants are disqualified); *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360.

⁴As, an employee of bondsmen on an instrument given by a party to secure him in possession of the property originally in controversy. *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171.

But the mere fact that the proposed juror in a suit against a street-railway company is in the employ of another street-railway company, is insufficient. *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568.

Nor is the fact that he is an employee of a defendant in another suit brought by plaintiff in the same court on the same issue, and set for trial the same day, of itself sufficient to raise a disqualifying presumption of bias, though it will support a challenge for favor, requiring inquiry into the question of bias. *Calhoun v. Hannan*, 87 Ala. 277, 6 So. 291.

If not made a statutory ground of disqualification, the challenge is addressed to the discretion of the trial judge. *Galveston, H. & S. A. R. Co. v. Thornsberry* (Tex.) 17 S. W. 521. But the relationship must be

conclusively shown as a fact. *Coppersmith v. Mound City R. Co.* 51 Mo. App. 357.

Hathaway v. Helmer, 25 Barb. 29. And the abolition of distress for rent has not changed the rule. *Ibid.*

10. — of party on juror.

One who possesses like means of control over a party, as, for instance, his landlord, is not absolutely disqualified; but the circumstance is to be considered on the question whether there is bias as matter of fact.¹

At common law this is ground of challenge to the favor only.

¹*People v. Bodine*, 1 Denio, 281, 306.

11. — acquaintance.

Intimate acquaintance¹ with a party or fellow service in employment² does not disqualify, but is a circumstance to be considered on the question of bias.

At common law this is ground of challenge to the favor only.

¹*Moore v. Cass*, 10 Kan. 288. But see *dictum* and authorities cited in *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

But a proposed juror who testifies that his acquaintance with a party will influence his verdict is properly excused. *Omaha Street R. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209.

So, also, that the juror is acquainted with a party's attorney, and had employed him professionally at some time, will not support a challenge for cause. *Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701; *Scott v. Rues*, 26 Misc. 834, 56 N. Y. Supp. 1057. Nor will the fact that the juror has his office in the same rooms with the attorney, where no other connection between them is shown to exist. *State ex rel. Richards v. Taylor*, 5 Ind. App. 29, 31 N. E. 543. But in *Fealy v. Bull*, 11 App. Div. 468, 42 N. Y. Supp. 569, a new trial was awarded because a juror had falsely stated on *voir dire* that he had never had business relations with counsel for the other party, when in fact he then was party to a pending suit, and was represented by that counsel.

²*People v. Bodine*, 1 Denio, 281, 306.

12. — opinion.

An opinion upon the merits of the case, previously formed or expressed, disqualifies, if it is positive and not merely hypothetical, and would require evidence to remove.

At common law this is ground of challenge for principal cause.¹

An opinion does not disqualify if the juror testifies that he believes he can render an impartial verdict according to the evidence, and that

his previously formed opinion or impression will not bias or influence his verdict, and the court is satisfied that he does not entertain such a present opinion or impression as will influence his verdict.²

If his testimony is not clear to this effect he should be excluded.³

¹*Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Spangler v. Kite*, 47 Mo. App. 230; *Doherty v. Lord*, 8 Misc. 227, 28 N. Y. Supp. 720; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32. See *Greenfield v. People*, 6 Abb. N. C. 1, and note. And in *Lewke v. Dry Dock, E. B. & B. R. Co.* 46 Hun, 283, a juror who testified that he would credit the opinion of a certain doctor as an expert witness more than that of any other who might testify, if they should differ in opinion, was held disqualified, though he testified on cross-examination that he would try to act according to his conscience, was capable of doing so, and thought he could consider the testimony of other doctors. But to render disqualification of a juror for this reason ground for new trial it must appear of record that he was examined on that point. *Light v. Chicago, M. & St. P. R. Co.* 93 Iowa, 83, 61 N. W. 380.

So, of an opinion formed from service as juror on former trial. *Scott v. McDonald*, 83 Ga. 28, 9 S. E. 770. But see *Central R. & Bkg. Co. v. Ogletree*, 97 Ga. 325, 22 S. E. 953. Or from service as jurors in other cases tried at that term and involving the same issues. *Missouri P. R. Co. v. Smith*, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752. And concealment of the fact of such previous service, and denial on voir dire of any opinion formed or expressed, is ground for new trial if the fact of his previous service was not learned by the defeated party or his counsel until after verdict. *Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. 643. But see *Buck v. Hughes*, 127 Ind. 46, 26 N. E. 558.

But a "slight opinion" formed by one juror who has forgotten even the statement made to him, and a conditional opinion by another, which did not concern the merits of the case, are not unqualified opinions which will disqualify, under the Colorado statute. *Collins v. Burns*, 16 Colo. 7, 26 Pac. 145. Nor will vague and indefinite or merely floating impressions based on newspaper report, or heard at about the time of the transaction. *State v. Carey*, 15 Wash. 549, 46 Pac. 1050.

And that a juror had, before trial, expressed a doubt as to the wisdom or expediency of the law under which the case was brought will not render him incompetent, if it is shown that he will be governed by the law of the case as laid down by the court. *Judd v. Claremont* (N. H.) 23 Atl. 427.

²*People v. Casey*, 96 N. Y. 115, Reversing 31 Hun, 158.

This is the modern rule sanctioned by the decisions in civil cases and established in New York, even in criminal cases, by statute, and in substance applied in other states, though not fully recognized in all. The principles involved are most frequently discussed in criminal cases.

To the same effect are:

Union Gold-Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; *Coghill v. Kennedy* (Ala.) 24 So. 459; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565, 567; *Denver, St. P. & P. R. Co.*

v. *Moynahan*, 8 Colo. 56, 5 Pac. 811; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515; *Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Scranton v. Stewart*, 52 Ind. 68; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Will v. Mendon*, 103 Mich. 251, 66 N. W. 58; *Montgomery v. Wabash, St. L. & P. R. Co.* 90 Mo. 446, 2 S. W. 409; *Rogers v. Rogers*, 14 Wend. 132; *Freeman v. People*, 4 Denio, 9; *Lowenberg v. People*, 5 Park. Crim. Rep. 414; *Sanchez v. People*, 22 N. Y. 147; *Kumli v. Southern P. R. Co.* 21 Or. 505, 28 Pac. 637; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905; *Haugen v. Chicago, M. & St. P. R. Co.* (S. D.) 53 N. W. 769; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32; *Conway v. Clinton*, 1 Utah, 215; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Jackson v. Com.* 23 Gratt. 919. But it is discretionary with the court, under such circumstances, to accept the juror. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Sprague v. Atlee*, 81 Iowa, 1, 46 N. W. 756.

¹*Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32.

13. — opinion as to incidental question.

An abstract opinion as to a question incidentally involved¹ does not disqualify, unless found to be such as to be likely to influence the verdict.²

¹For instance, in a life insurance case, the question whether suicide is evidence of insanity. Compare *Hagadorn v. Connecticut Mut. L. Ins. Co.* 22 Hun, 249, and *Boileau v. Life Ins. Co.* 9 Phila. 218. Or in an action for wilfully, fraudulently, and corruptly refusing a vote, an opinion as to the duty to receive a vote. *Elbin v. Wilson*, 33 Md. 135, 143.

²*Dew v. McDivitt*, 31 Ohio St. 139, 142; *Hughes v. Cairo*, 92 Ill. 339; *Davis v. Walker*, 60 Ill. 452.

14. — conversations with party.

A juror with whom a party has conversed as to the merits of the case is disqualified.¹

¹*United States Rolling Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436.

But not so of a private conversation during trial having no reference to the case. *Kelley v. Downing*, 69 Vt. 266, 37 Atl. 968.

15. — prejudice.

Prejudice against the business or calling in connection with which the cause of action arises disqualifies, if found to be such as to be likely to influence the verdict;¹ otherwise not.²

At common law this is ground of challenge to the favor only.

¹*United States v. Borger*, 7 Fed. Rep. 193 (criminal case); *Lombardi v. California Street Cable R. Co.* (Cal.) 57 Pac. 66; *Winnesheik Ins. Co.*

v. Schueller, 60 Ill. 465; *Robinson v. Randall*, 82 Ill. 521; *Albrecht v. Walker*, 73 Ill. 69; *Fletcher v. Crist*, 139 Ind. 121, 38 N. E. 472; *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Brockway v. Patterson*, 72 Mich. 122, 1 L. R. A. 708, 40 N. W. 192; *Theisen v. Johns*, 72 Mich. 285, 40 N. W. 727.

**Maretzek v. Cauldwell*, 5 Robt. 660, 2 Abb. Pr. N. S. 407; *Missouri P. R. Co. v. Brown*, 5 Kan. App. 880, 47 Pac. 553; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Owen v. Kamer*, 16 Ky. L. Rep. 705, 29 S. W. 437; *Fortune v. Trainor*, 47 N. Y. S. R. 58, 19 N. Y. Supp. 598; *DePuy v. Quinn*, 61 Hun. 237, 16 N. Y. Supp. 708; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295.

16. — litigation.

Litigation between a party and a juror disqualifies absolutely, if an action implying ill-will, malice, or revenge—such as assault, slander, etc.—is pending; otherwise it does not disqualify, unless found to be likely to influence the verdict.¹

At common law the former is ground for challenge for principal cause; the latter, for challenge to the favor only.

¹*People v. Bodine*, 1 Denio, 281, 305.

Having a cause of action against the defendant upon the same state of facts is enough to disqualify. *Davis v. Allen*, 11 Pick. 466, 22 Am Dec. 386; *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 30 L. R. A. 560, 33 S. W. 208. "There is abundant latitude for selection; none should sit who are not entirely impartial." (Shaw, Ch. J., in *Davis v. Allen*, *supra*.)

17. Challenging; sufficiency.

A challenge for cause, whether principal or to the favor, or for actual or implied bias, must specify the ground on which, if at all, it can be sustained,—simply challenging "for cause" being insufficient.¹

¹*Southern P. Co. v. Rauh*, 7 U. S. App. 84, 49 Fed. Rep. 696, 1 C. C. A. 416 (Or. Code Civ. Proc. § 237); *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (Utah Laws 1878, § 242); *Bonney v. Cocke*, 61 Iowa, 303, 16 N. W. 139; *Davis v. Anchor Mut. F. Ins. Co.* 96 Iowa, 70, 64 N. W. 687; *Haggard v. Petterson*, 107 Iowa, 417, 78 N. W. 53 (Iowa Code, § 2772).

18. — time for challenging.

Either party may be allowed to challenge a juror for cause at any time before he has been sworn as a juror.¹

¹*Edelen v. Gough*, 8 Gill, 87, 89; *Scripps v. Reilly*, 38 Mich. 10. In the latter case, Marston, J., says: "Whether counsel for the different parties have exhausted their peremptory challenges, and announced themselves satisfied with the jury, or not, they have undoubtedly the right,

certainly up to the time when the jury is sworn, to make further challenge for cause. It is the aim and policy of the law to have a fair and impartial jury, and to this end it would be the clear duty of the court up to the last minute to permit counsel to further examine the jurors." *People v. Damon*, 13 Wend. 351, lays down the broader, but very just, rule that the court may allow necessary challenges to secure an impartial jury, at any time before testimony has been taken. And this rule was followed in *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. And see *People v. Owens*, 123 Cal. 482, 56 Pac. 251. But a challenge must be made before the jury is impaneled. See *Baxter v. Wilson*, 95 N. C. 137.

19. Trial, evidence, and decision.

A challenge, whether for principal cause or to the favor, is now triable only by the judge.¹

At common law it may be tried by the judge, if no objection be made;² but if the judge or a party object a question of fact raised by either kind of challenge is to be tried by triers.

On a question of actual bias even slight evidence is admissible.³ The object of inquiry is the state of mind of the proposed juror; and that state must be such, in order to make him competent, as will lead to the inference that he will act with entire impartiality.⁴

¹This is now the common practice and prescribed in N. Y. Code Civ. Proc. § 1180. But the distinct and wholly different nature of the two grounds of challenge still exists in New York, notwithstanding this statute. *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 121 N. Y. 112, 24 N. E. 187.

So, also, by statute in most states. See *McCarthy v. Cass Ave. & F. G. R. Co.* 92 Mo. 536, 4 S. W. 516; *Haugen v. Chicago, M. & St. P. R. Co.* (S. D.) 53 N. W. 769. And see statutes of various other states.

²*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

³*People v. Bodine*, 1 Denio, 281, 307.

⁴*May v. Elam*, 27 Iowa, 365 (Dillon, J.)

20. Exception.

An exception lies to the erroneous overruling of an objection or challenge,¹ but it may be unavailing if the party does not finally exhaust his peremptory challenge;² or unless the court so erroneously exercised its discretion as to deprive the complaining party of trial by a fair and impartial jury.³ Some courts, however, hold the trial judge's decision on a challenge for actual bias final, and not reviewable.⁴

¹In *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297, it was held that a ruling on a challenge for cause, if erroneous, is an error of law which must be

presented for review by bill of exceptions, and not a mere irregularity which can be presented by affidavits.

**Robinson v. Randall*, 82 Ill. 521 (Dickey, J., dissented, being of opinion that the not exhausting the peremptory challenge did not render the error harmless); *Sullings v. Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451; *Whitaker v. Carter*, 20 N. C. (4 Ired.) 461. s. p. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Eckert v. St. Louis Transfer Co.* 2 Mo. App. 36, and *Conway v. Clinton*, 1 Utah, 215, where, however, the objectionable jurors had been excluded by other challenges.

To similar effect are: *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684; *Union P. R. Co. v. Tracy*, 19 Colo. 331, 35 Pac. 537; *Haggard v. Petterson*, 107 Iowa, 417, 78 N. W. 53; *State v. Simmons*, 38 La. Ann. 41; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Brumback v. German Nat. Bank*, 46 Neb. 540, 65 N. W. 198; *Savage v. Third Ave. R. Co.* 25 Misc. 426, 54 N. Y. Supp. 932; *State v. Hartley*, 22 Nev. 342, 28 L. R. A. 33, 40 Pac. 372; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Galveston, H. & S. A. R. Co. v. Thornsberry* (Tex.) 17 S. W. 521; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *State v. Moody*, 7 Wash. 395, 35 Pac. 132; *Pool v. Milwaukee Mechanics' Ins. Co.* 94 Wis. 447, 69 N. W. 65.

In New York the rule is that an exception duly taken to an erroneous overruling of defendant's challenge for cause is not waived by his omission to challenge peremptorily, though when the jury is filled he still has unused peremptory challenges. *People v. Bodine*, 1 Denio, 281; *Freeman v. People*, 4 Denio, 9. And that if by the erroneous ruling he is compelled to exhaust his peremptory challenges, reversal of the judgment is imperative. *Finkelstein v. Barnett*, 17 Misc. 564, 40 N. Y. Supp. 694; *People v. Casey*, 96 N. Y. 115; *People v. Larubia*, 140 N. Y. 87, 35 N. E. 412.

In Idaho a party who is compelled to use a peremptory challenge to exclude an incompetent juror, and who, before the jury is completed, desires to use a peremptory challenge, but cannot, because he has exhausted his allowance, should, on showing that the juror excluded was incompetent, have his peremptory challenge restored. *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98.

**Salazer v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

**State v. Potts*, 100 N. C. 457, 6 S. E. 657, and cases cited; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (Utah Laws 1884, p. 124); *Perry v. Miller*, 61 Minn. 412, 63 N. W. 1040; *Hawkins v. Mans-ton*, 57 Minn. 323, 59 N. W. 309, and cases cited.

21. Peremptory challenge; nature and extent of right.

Unless given by statute, no right to peremptory challenges exists.¹

¹*Brown v. Rome & D. R. Co.* 86 Ala. 206, 5 So. 195. Peremptory challenges are given in civil cases by the statute *ex gratia*, and the party is not entitled to them independently of the statute as matter of right. Per-

emptory challenges are exercised by a party, not in the selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger. *O'Neil v. Lake Superior Iron Co.* 67 Mich. 560, 35 N. W. 162; citing *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350. The power of a state legislature to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury; and a statute varying the number for different communities is not unconstitutional as denying to a party the equal protection of the law. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

The Texas statute requiring the same proceedings in regard to talesmen as in impaneling other jurors includes the right of peremptory challenge if the number allowed has not been already exhausted. *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

The right of peremptory challenge has no application, however, to a struck jury.¹

¹*Watson v. St. Paul City R. Co.* 42 Minn. 46, 43 N. W. 904. There can be only challenges for cause. *Eldridge v. Hubbell* (Mich.) 77 N. W. 631. And the fact that talesmen are called to complete the jury makes no difference. *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545.

A peremptory challenge is a *privilege*, the cause of which the party is never bound to make known, and on which the court must act without requiring reasons.¹

¹*Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117.

22. — order of.

By statute in some states, plaintiff must be the first to exercise the right of peremptory challenge.¹ But in the absence of a statute or rule of court governing the order of peremptory challenges, the matter is discretionary with the trial court, whose decision is final, unless he has abused his discretion.²

¹*Hegney v. Head*, 126 Mo. 619, 29 S. W. 587 (Mo. Rev. Stat. 1889, § 6081); *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

And under such a statute defendant cannot be compelled to challenge first, though he has the burden of proof. *Hegney v. Head*, *supra*.

An interpleader in attachment is the plaintiff within the Missouri statute; and it is error not to require him to challenge. *Cunningham v. Prusansky*, 59 Mo. App. 498. But error in requiring defendant to challenge first is not cause for reversal, if it does not appear that he is prejudiced thereby. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

²*Gravelly v. State*, 45 Neb. 878, 64 N. W. 452.

23. — when interposed.

A party has a right to reserve his peremptory challenges until the number is full, after objections or challenges for cause have been disposed of.¹

¹*Sterling Bridge Co. v. Pearl*, 80 Ill. 251, 254; *Taylor v. Western P. R. Co.* 45 Cal. 323.* The headnote in the latter case is as follows: "In a civil action a party is not bound to exercise his right of peremptory challenge to jurors until there are in the jury box twelve persons whom the court has adjudged to be competent jurors." Judgment was reversed for error in requiring a party to do so.

The reason is that unless a party has ascertained what jurors can be excluded for cause, and therefore need not be challenged peremptorily, he may have the chief value of this privilege. *Hunter v. Parsons*, 22 Mich. 96, citing 4 Bl. Com. 353; *People v. Bodine*, 1 Denio, 281. To the same effect is *Taylor v. Western P. R. Co.* 45 Cal. 323.

And according to *Gulf, C. & S. F. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129, if after challenges for cause twelve jurors remain on the panel and are in the box, the parties must then proceed to challenge peremptorily, and cannot insist on calling in the whole panel into the box, or filling the vacancies.

But a party who voluntarily and without objection exercises his right of peremptory challenge alternately with the other party as the jurors are being drawn, and who, after the panel is filled, refuses to challenge in his turn, cannot complain of the court's refusal to allow him to challenge after the jury has been accepted by the other party. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

The statutes in some states are held to impose a different rule. Thus, under an Illinois statute, when a panel of four has been accepted by both parties, they become a part of the jury, and cannot thereafter be challenged peremptorily. *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216, 25 Ill. App. 67. So, also, of a panel of eight. *Ibid.*

24. — same.

A peremptory challenge is not too late at any time before the jury is sworn unless there is reason to doubt its good faith.¹ But it will not be allowed after the jury is sworn,² unless for good cause shown.³

¹*Hunter v. Parsons*, 22 Mich. 96; *Adams v. Olive*, 48 Ala. 551.

And the fact that a party may pass the panel as satisfactory to him will not prevent him challenging one of the jurors so passed at any time before he is sworn. *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

Although ordinarily the court should be satisfied of the good faith of an application to withdraw approval and challenge peremptorily instead, yet where an adjournment has intervened so that the jury may have been influenced, the right of peremptory challenge exists at the time of swearing the jury, and it is error to refuse to allow it. *Spencer v. DeFrance*, 3 G. Greene, 216. Especially, if, after approving the jury as it stood, a vacancy was made and a new juror called. *United States v. Daubner*, 17 Fed. Rep. 793, 797.

But in Massachusetts it is the practice to swear jurors at the beginning of the session to give a true verdict in all causes committed to them. When the right of peremptory challenge was first given in civil causes by statute 1862, § 84, the supreme judicial court was authorized to prescribe by rules the manner in which it should be exercised (Pub. Stat. chap. 170, § 37); but, no rules having been prescribed, the practice in civil causes became established of permitting peremptory challenges up to the time when the trial commenced by the reading of the writ, or by some action which, in the ordinary sense of the words, may be said to be the beginning of the trial. And this statutory right extends to bystanders upon the panel as well as to jurors regularly summoned, and they may be challenged after they have been sworn, but before anything else is done. *Sackett v. Ruder*, 152 Mass. 397, 9 L. R. A. 391, 25 N. E. 736.

¹*Thorp v. Deming*, 78 Mich. 124, 43 N. W. 1097; *Ayres v. Hubbard*, 88 Mich. 155, 50 N. W. 111.

²*Peoria, D. & E. R. Co. v. Puckett*, 52 Ill. App. 222.

25. — number of.

The number of peremptory challenges depends on the statute of the jurisdiction.¹ Where several defendants unite in pleading, and appear by the same counsel, they are entitled to but one set of peremptory challenges.² If they plead separately and appear by different counsel with defense on which the verdict may be for one and against another they are each entitled to the statute number.³

¹The New York statute allows six to each party in a court of record, and three to each party in a court not of record. Code Civ. Proc. § 1176. The United States statute three. U. S. Rev. Stat. § 819. *United States v. Daubner*, 17 Fed. Rep. 793, 979. And compare the statutes of the various other states.

Where a juror is excused for illness, and another juror called in his place during the trial and the trial commenced *de novo*, as provided by a Tennessee statute, a party who has exhausted his peremptory challenges is not entitled to further peremptory challenges. *Bruce v. Beall*, 100 Tenn. 573, 47 S. W. 204.

²*Stone v. Segur*, 93 Mass. 568; *Bibb v. Reid*, 3 Ala. 88; *Stroh v. Hinchman*, 37 Mich. 490.

The word "party" in a statute giving each party two peremptory challenges signifies "side;" and only two peremptory challenges may be had on a side, although there are a number of parties. *Moore v. Bricklayers' Union No. 1*, 7 Ry. & Corp. L. J. 108.

So, the defendants in the aggregate, and not each defendant, in a suit in which the issues to be tried between plaintiff and all the defendants are the same, are entitled to six peremptory challenges under the Texas statute allowing each party six peremptory challenges. *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 695. So, also, of several officers sued jointly for false imprisonment where there is no antagonism of interest between

them. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772. And several attaching creditors who are identified with each other and together constitute the parties on one side against interveners who claim that a sale to the defendant of the goods attached was obtained by fraud will be treated as one party under this statute. *Raby v. Frank*, 12 Tex. Civ. App. 125. And so of plaintiff and interveners who both seek to hold defendant liable on an insurance policy. *Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 227, 28 S. W. 1027. And refusal to allow two defendants whose interests are similar three challenges each is not reversible error,—especially where it does not appear that they exhausted their peremptory challenges, or that an objectionable jury was forced on them. *Allen v. Waddill* (Tex. Civ. App.) 26 S. W. 273.

And a refusal to allow six peremptory challenges to each of several defendants sued jointly, if error, is not prejudicial, where after six challenges had been exhausted two additional jurors were placed on the panel, neither of whom was challenged by any of the defendants. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

**Stroh v. Hinchman*, 37 Mich. 490 (Cooley, J.); *McLaughlin v. Carter*, 13 Tex. Civ. App. 694, 37 S. W. 666. Compare *Sodousky v. McGee*, 4 J. J. Marsh. 267, 269. *Contra* in the United States courts. U. S. Rev. Stat. § 819.

An order of court that actions by the same plaintiff against different defendants be consolidated and tried together cannot deprive the defendants of their several challenges. *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 707.

26. Court may set aside juror.

The court has power, before testimony has been taken, to set aside a juror irrespective of whether he has been challenged;¹ and so doing is not error if an impartial jury is had,² and the objection did not exhaust the objector's peremptory challenges.³

¹*Gilliam v. Brown*, 43 Miss. 641, 652, and cases cited. It is the duty of the court to watch over the impaneling of a jury so as to preserve its impartiality and purity. *Gilliam v. Brown*, *supra*; *United States v. Reed*, 2 Blatchf. 435, 450; *Torrent v. Yager*, 52 Mich. 506, 18 N. W. 239.

The better opinion is that this power may be exercised at any time before testimony has been taken. *People v. Damon*, 13 Wend. 351; *Silsby v. Foote*, 14 How. 218, 14 L. ed. 394.

For illustrative cases, compare *O'Neil v. Lake Superior Iron Co.* 67 Mich. 560, 35 N. W. 162; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496; *Welch v. Tribune Co.* 83 Mich. 661, 11 L. R. A. 233, 47 N. W. 562; *Chicago, M. & St. P. R. Co. v. Harper*, 128 Ill. 384, 21 N. E. 561; *Santee v. Standard Publishing Co.* 36 App. Div. 555, 55 N. Y. Supp. 361.

**Atlas Min. Co. v. Johnston*, 23 Mich. 36, 40; *Pittsburg, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582.

**Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74, citing *People v. Ferris*, 1 Abb. Pr. N. S. 193. But see *O'Neil v. Lake Superior Iron Co.* 67 Mich. 550, 35 N. W. 162.

III.—MOTIONS ON THE PLEADINGS.

1. Defendant's motion to dismiss or for judgment on the pleadings, for insufficiency of complaint.
2. — several defendants.
3. — specifying the ground.
4. — exception to ruling.
5. — amending to defeat the motion.
6. — motion, when to be made.
7. Defendant's motion to dismiss or for judgment on the pleadings, because of admitted defense.
8. Plaintiff's motion for judgment for insufficiency of answer, or because of admitted cause of action.
9. — test of sufficiency.
10. — motion, when to be made.
11. — waiver of right to move.
12. — exception to ruling.
13. Motion to compel election.
14. — inconsistent defenses.
15. — waiver of objection.
16. — misjoinder.
17. — exception to ruling.
18. — assessing damages.
19. Motion to strike out.
20. — discretion of court.
21. Motion to make more definite and certain.

1. Defendant's motion to dismiss or for judgment on the pleadings, for insufficiency of complaint.

The objection that the complaint does not state facts to constitute a cause of action is not waived by going to trial without raising it by answer or demurrer, but it may be taken by motion, at the trial, to dismiss,¹ or for such judgment for defendant as he is entitled to on the pleadings.² So, of the objection that the court has not jurisdiction of the subject of the action. For the purposes of the motion, the allegations of the complaint are to be deemed true, as on demurrer.³

¹*Tooker v. Arnoux*, 76 N. Y. 397, and cases cited; *Mosselman v. Caen*, 4 Thomp. & C. 171, 1 Hun, 647; *Luddington v. Taft*, 10 Barb. 447; *Stan-nard v. Eytinge*, 5 Robt. 80, 3 Abb. Pr. N. S. 42, 33 How. Pr. 262; *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Hand v. Shaw*, 20 Misc. 698, 46 N. Y. Supp. 528; *McCullough v. Pence*, 85 Hun, 271, 32 N. Y. Supp. 986;

Mills v. Knapp, 39 Fed. Rep. 592; *Milhollin v. Fuller*, 1 Ind. App. 58, 27 N. E. 112; *Martin v. Creech*, 58 Mo. App. 391; *Knowles v. Norfolk S. R. Co.* 102 N. C. 62, 9 S. E. 7; *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173; *Pescud v. Hawkins*, 71 N. C. 299. Compare *Saunders v. Pendleton*, 19 R. I. 292, 36 Atl. 89; *Richmond v. Brookings*, 48 Fed. Rep. 241. But see *Thomas v. Smith*, 75 Hun, 573, 27 N. Y. Supp. 589, where, although recognized as lawful, this practice was not commended as the best means to promote the ends of justice; but judgment of dismissal was reversed because the court held the complaint sufficient, though the court considered defendant had recognized its sufficiency by answering.

An allegation of the conclusion of law which the omitted fact was essential to make out was held not enough to sustain the complaint against such motion, in *Sheridan v. Jackson*, 72 N. Y. 170.

In Georgia, a defendant desiring to assail the petition for insufficiency must do so at the first term; failing in which, plaintiff is entitled to be heard on the merits, and an oral motion at trial to dismiss will not be entertained. *Bishop v. Woodward*, 103 Ga. 281, 29 S. E. 968. But see *Mad-dow v. Randolph County*, 65 Ga. 216.

In Colorado, failing to demur and answering accepts the complaint as stating a cause of action; and the court cannot, of its own motion during the trial, dismiss a count setting up a separate cause of action on the ground of insufficiency. *Kyes v. Best*, 8 Colo. App. 129, 45 Pac. 227.

In Iowa, the objection can be taken only by motion in arrest of judgment before judgment is entered. *Draper v. Ellis*, 12 Iowa, 316; *Pierson v. Independent School Dist.* 106 Iowa, 695, 77 N. W. 494.

In some states insufficiency of the complaint or petition to state a cause of action is made the ground of an objection to the introduction of any evidence, interposed immediately after plaintiff's opening; and this question will be discussed in the *Brief on the Pleadings*, in its appropriate place.

Objections waived.—A motion to dismiss is not proper, however, for other objections to be taken by answer or demurrer, and which are expressly waived if not so raised; as, for instance, misjoinder of causes of action. *Barnard v. Brown*, 43 N. Y. S. R. 602, 17 N. Y. Supp. 532; *Davis Lumber Co. v. Home Ins. Co.* 95 Wis. 542, 70 N. W. 59; *Burns v. Ashworth*, 72 N. C. 496; *Densmore v. Shepard*, 46 Minn. 54, *sub nom.* *Densmore v. Red Wing Lime & Stone Co.* 48 N. W. 528, 681.

Or that the action was not brought by the real party in interest. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696.

Or that plaintiff is seeking equitable relief, when he has an adequate remedy at law, if jurisdiction of equity and law is not concurrent. *Ketchum v. Depew*, 81 Hun, 278, 30 N. Y. Supp. 794.

So, also, of the objection that the cause of action is not equitable in its nature, but is merely for money paid and received in violation of a statute, although plaintiff is seeking equitable relief. *Stiefel v. New York Novelty Co.* 14 App. Div. 371, 43 N. Y. Supp. 1012.

And of misjoinder of parties plaintiff. *Schwartzel v. Karnes*, 2 Kan. App. 782, 44 Pac. 41; *Densmore v. Shepard*, 46 Minn. 54, *sub nom.* *Densmore v. Red Wing Lime & Stone Co.* 48 N. W. 528. The remedy being, accord-

ing to *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006, correction of the petition by striking out the improper party by special demurrer.

So, in a personal action in a justice's court, withdrawal of a motion to dismiss for want of jurisdiction of the parties, and consent to try the case on the merits, waives the objection of want of jurisdiction. *Luco v. Tuolumne County Super. Ct.* 71 Cal. 555, 12 Pac. 677.

Nor does the practice apply to a cause of action defectively stated as to form. *Johnson v. Crookshanks*, 21 Or. 339, 28 Pac. 78. Or where the cause is tried on an agreed statement of facts. *Hines v. Wilmington & W. R. Co.* 95 N. C. 434. And defendant cannot, after admitting in his answer the execution and delivery of the note sued on, move to dismiss, because the note was not filed with the petition, though so stated therein. *Fenwick v. Bowling*, 50 Mo. App. 516.

It is not a fatal objection to a complaint, upon motion to dismiss, that it contains irrelevant or redundant matter, or that the allegations are indefinite or uncertain. Such defects are to be remedied by motion to strike out, or to make more definite and certain. *Simmons v. Eldridge*, 29 How. Pr. 309, 10 Abb. Pr. 296. See *post*, §§ 18 *et seq.*

**Denis v. Velati*, 96 Cal. 223, 31 Pac. 1; *Greenleaf v. Egan*, 30 Minn. 316, 15 N. W. 254; *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573; *Hawkins v. Overstreet*, 7 Okla. 277, 54 Pac. 472; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680.

A motion for judgment on the pleadings goes to the substance of the pleading attacked, and not to the form; and, as a general proposition, such a motion, based on the facts established by the pleadings, cannot be sustained, except where, under those facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced; or unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined; hence the rule that the motion cannot prevail, unless, on the facts established, the court can, as matter of law, pronounce judgment on the merits,—that is, determine the rights of the parties to the subject-matter of the controversy, and render a judgment in relation thereto which is final between the parties. *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680. See also *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

So, frivolousness of plaintiff's pleadings will support such a motion. N. Y. Code Civ. Proc. § 537. But its insufficiency in this respect must be so clear that it appears upon the statement without any further argument. *Henriques v. Trowbridge*, 27 App. Div. 18, 50 N. Y. Supp. 103 (holding that § 537, above, applies only to a reply served for the reason that the answer sets up a counterclaim).

But a mere formal defect, such as want of verification, cannot be reached by such a motion. *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891.

The question of sufficiency of pleadings, generally, to withstand such a motion, belongs properly to the *Brief on the Pleadings*, and will be there fully discussed under the appropriate heads.

**Sheridan v. Jackson*, 72 N. Y. 170, Aff'g 10 Hun, 89; *Floyd v. Johnson*, 17 Mont. 471, 43 Pac. 631; *People v. Johnson*, 95 Cal. 471, 31 Pac. 611; *Merchants' Nat. Bank v. Eckels*, 191 Pa. 372, 43 Atl. 245; *Haun v. Trainor*, 190 Pa. 1, 42 Atl. 367; *Ketchum v. Van Dusen*, 11 App. Div. 332, 42 N. Y. Supp. 1112.

And it will be so treated on appeal, if plaintiff excepts to a dismissal instead of amending. *Sheridan v. Jackson*, 72 N. Y. 170, Affirming 10 Hun, 89. The question being, Do the facts alleged constitute a cause of action? *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573.

And the complaint, although not stating an essential fact by explicit, positive averment, as required by the rules of pleading, will be upheld when first assailed by motion for judgment on the pleadings, if such fact appears by plain and necessary implication. *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106. And the motion, whether demanding dismissal or judgment for defendant on the pleadings, denied, if the complaint states facts entitling plaintiff to any relief, legal or equitable. *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Stafford v. Merrill*, 62 Hun, 144, 16 N. Y. Supp. 467; *Hawkins v. Overstreet*, 7 Okla. 277, 54 Pac. 472.

Whether the motion to dismiss can be denied because the answer contains the matter which the defendant objects has not been alleged is disputed.¹

But a motion for judgment for defendant is precluded if plaintiff's pleadings raise a material issue to be tried,² or if the defect in the complaint is so apparent as not to mislead defendant,³ and is supplied by the answer.⁴

¹Compare *Miller v. White*, 4 Hun, 62, 6 Thomp. & C. 255; *Toop v. New York*, 36 N. Y. S. R. 724, 13 N. Y. Supp. 280, and *Leon v. Bernheimer*, 10 Week. Dig. 288, on the one hand; and *Smith v. Van Ostrand*, 64 N. Y. 278, 280, and *Russell v. New York*, 1 Daly, 263, on the other. See also *Hughes v. Carson*, 90 Mo. 399, 2 S. W. 441 (holding that any omission to state a material fact in the petition is obviated if the answer put it in issue).

²A single material issue precludes a judgment on the pleadings. See *Iba v. Central Asso.* 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. See also *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318; *Miles v. Edsall*, 7 Mont. 185, 14 Pac. 710; *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631, and cases cited; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

³*Clement v. Hughes*, 13 Ky. L. Rep. 352, 17 S. W. 285.

⁴*Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594.

2. — several defendants.

If the action is against more than one defendant the objection may be made on behalf of any one or more of them as to whom sufficient facts are not stated, and the complaint dismissed as to him or them.¹

¹*Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459.

3. — specifying the ground.

The motion to dismiss should specify the defect with sufficient clearness to enable plaintiff to amend.¹

¹See *Higgins v. Newton & F. R. Co.* 66 N. Y. 604, Affirming 3 Hun, 611; *Robbins v. Woolcott*, 66 Barb. 63; *Rector v. Clark*, 78 N. Y. 21, Reversing 12 Hun, 189. In *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621, a motion to dismiss for insufficiency was held a demurrer, and should be disregarded, as provided by a statute forbidding consideration of demurrer, unless it specify the particulars in which the complaint is deficient.

4. — exception to ruling.

The granting of the motion, when the complaint is bad and the motion is seasonably made and amendment is not made, is not matter of discretion, but of legal right.¹ But if the defect is one proper for amendment, subsequent proof of the omitted facts cures error in denying the motion to dismiss.² And an exception to its denial will be unavailing if the complaint is subsequently held bad on demurrer.³

¹*Tooker v. Arnoux*, 76 N. Y. 397; *Fuller v. Brown*, 76 Hun, 557, 28 N. Y. Supp. 189; *Hand v. Shaw*, 20 Misc. 698, 46 N. Y. Supp. 528. And see *Clift v. Rodger*, 25 Hun, 39, 43. Compare, however, *Clark v. Crego*, 51 N. Y. 646, Affirming 47 Barb. 599.

An order of denial of the motion is not appealable. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947; *Burrell v. Hughes*, 116 N. C. 430, *sub nom. State ex rel. Burrell v. Hughes*, 21 S. E. 971. And a review can be had only on appeal from the judgment on exception taken. *Ronalds v. Cammann*, 40 N. Y. S. R. 690, 16 N. Y. Supp. 72. Or from a judgment denying a new trial or dismissing the action. *Thorpe v. Lorenz*, 34 Minn. 350, 25 N. W. 712.

In Ohio, dismissal for insufficiency, in the absence of request to amend, is not a dismissal without final hearing from which an appeal will lie. *Radcliff v. Radcliff*, 15 Ohio C. C. 284.

In the absence of a bill of exceptions showing the ground of dismissal, it will be presumed that the dismissal was proper on the facts. *Chicago v. Porter*, 124 Ill. 589, 16 N. E. 854.

And in Missouri the motion and ruling thereon cannot be considered unless set out in the bill of exceptions. *Reitz v. Pottton*, 73 Mo. App. 616.

But in Rhode Island the granting or refusal of a motion to dismiss being a matter of discretion with the court, no exception lies. *Duggan v. McCarthy*, 5 New Eng. Rep. 887, 13 Atl. 400.

²*Lounsbury v. Purdy*, 18 N. Y. 515; *Morton v. Pinckney*, 8 Bosw. 135; *Horowitz v. Pakas*, 22 Misc. 520, 49 N. Y. Supp. 1008.

³*Conaway v. Conaway*, 10 Ind. App. 229, 37 N. W. 189.

5. — amending to defeat the motion.

The court has power to allow the defect to be supplied by amend-

ment to defeat the motion¹ if the amendment does not substantially change the cause of action,² nor make the case one requiring a different mode of trial.³ But defendant should be allowed to amend also to meet the new allegations,⁴ and to have an adjournment if surprised.⁵

¹*Woolsey v. Rondout*, 2 Keyes, 603; *Simmons v. Lyons*, 55 N. Y. 671, Affirming 3 Jones & S. 554; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. 451 (with disapproval of the practice of dismissing on the pleadings, when no demurrer was taken (Cooley, J.)). And see *Steuben County v. Wood*, 24 App. Div. 442. But a plaintiff who has not asked leave to so amend cannot be allowed to amend on appeal by defendant after denial of the motion. *Alleman v. Bowen*, 61 Hun, 30, 15 N. Y. Supp. 318.

²Same cases.

³*Bockes v. Lansing*, 74 N. Y. 437, Affirming 13 Hun, 38; *Stevens v. New York*, 84 N. Y. 296.

⁴See *Union Bank v. Mott*, 11 Abb. Pr. 42; *Crane v. Lipscomb*, 24 S. C. 430.

⁵See *ante*, Division I., § 12.

6. — motion, when to be made.

The appropriate time for a motion to dismiss the complaint for insufficiency is before the case is opened or before evidence is adduced; but the court may entertain such a motion at any stage of the case¹ before evidence supplying the defect is heard.² If the motion to dismiss is not made until after the evidence is in, it should not be granted merely for insufficiency of the complaint, if the cause of action is proved and defendant has not been surprised or prejudiced.³

¹*Scofield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. N. S. 320, Affirming 10 Abb. Pr. N. S. 104; *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471; *Ryan v. Fulghum*, 96 Ga. 234, 22 S. E. 940 (holding such motion proper any time before verdict).

And *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050, held that a motion for judgment on the pleadings for insufficiency of the petition may be interposed before trial or verdict, or at any time during the course of the pleadings.

²*Perkins v. Giles*, 53 Barb. 342

The reason is, the court is not bound to try an action where no cause is alleged. The motion was made (and sustained on appeal) in *Sheridan v. Jackson*, 72 N. Y. 170, after admissions of fact had been made by plaintiff. 10 Hun, 89, 90. And in *Smith v. Van Ostrand*, 64 N. Y. 278, after some evidence had been given under the complaint but none under the answer.

And, a motion to dismiss, made at the close of plaintiff's case, and after evidence proving it had been admitted without objection, is not proper, if no such motion was made at opening. *Kruger v. Galewski*, 13 Misc. 56, 34 N. Y. Supp. 451; *Cielfield v. Browning*, 9 Misc. 98, 29 N. Y. Supp. 710; *McLain v. British & Foreign Marine Ins. Co.* 16 Misc. 336, 38 N.

Y. Supp. 77. And even where it is made at the opening, and renewed at the close, of plaintiff's case, its denial will not require reversal when testimony is thereafter offered by defendant. *Derrick v. Emmens*, 38 N. Y. S. R. 481, 14 N. Y. Supp. 360.

**Miller v. White*, 8 Abb. Pr. N. S. 46, less fully, 57 Barb. 504, Reversed on another ground, in 50 N. Y. 137; *Rector v. Clark*, 78 N. Y. 21, Reversing 12 Hun, 189; *Meyers v. Cohn*, 4 Misc. 185, 23 N. Y. Supp. 996.

2 Defendant's motion to dismiss or for judgment on the pleadings, because of admitted defense.

The court may entertain a motion at the trial for dismissal of the complaint,¹ or a motion for such judgment for defendant as he is entitled to on the pleadings,² on the ground that a defense is admitted on the pleadings.

**Cauchois v. Proctor*, 1 App. Div. 16, 36 N. Y. Supp. 957. Even if the admission claimed is inferred from the ambiguity or informality of an allegation or denial. *Clark v. Dillon*, 15 Abb. N. C. 265; *Millville Mfg Co. v. Salter*, 15 Abb. N. C. 305. *Contra*, *Green v. Raymond*, 14 N. Y. Week. Dig. 322.

But an admission of the defense set up, coupled with an allegation that it is a conditional defense, and that defendant has not complied with the condition, is not an admission within the rule. *Mollyneaux v. Wittenberg*, 39 Neb. 547, 58 N. W. 205.

*Thus, where plaintiff fails to reply. *Schurmeier v. English*, 46 Minn. 306. 48 N. W. 1112; *Watkins v. Southern P. R. Co.* 38 Fed. Rep. 711, 4 L. R. A. 239; *Orr, S. & Co. v. Gilbert*, 68 Ill. App. 429; *Dean v. Messer*, 17 Ky. L. Rep. 14, 30 S. W. 198. But under the Oklahoma Code of 1890 a motion by defendant for judgment on the pleadings before plaintiff had been ruled, as required by the Code, to reply to allegations of new matter in the answer, was properly refused. *Keokuk F. Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484. If a reply is unnecessary, because the answer amounts only to the general issue, and sets up new facts constituting a defense, a motion for judgment on the pleadings is not proper. *Brown v. Spear*, 5 How. Pr. 146. And see *Iba v. Central Asso.* 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

Or fails to reply within the proper time. *Heebner v. Shepard*, 5 N. D. 56, 63 N. W. 892.

Or fails to specifically deny new matter set up by way of defense. See *Wyatt v. Henderson*, 31 Or. 48, 48 Pac. 790. And if the admissions of the reply so contradict the allegations of the complaint as to defeat the right of action, the remedy is by motion for judgment on the pleadings. *Ibid.* And defendant's right to judgment on the pleadings on this ground is not affected by the fact that he did not move until after verdict. *Benicia Agri. Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676.

Or to file the requisite verified denial of allegations of new matter set up by way of defense. *Limerick v. Barrett*, 3 Kan. App. 573, 43 Pac. 853.

But mere failure of the reply to designate the count of the answer it is intended to deny will not authorize judgment for defendant on the pleadings. *Highlands v. Raine*, 23 Colo. 295, 47 Pac. 283.

Where the reply admits certain facts set out in defendant's answer, the question, on defendant's motion for judgment because of those admissions, is the sufficiency of the admitted facts to warrant the judgment demanded by defendant, and the materiality or immateriality of those upon which issue is joined. *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680. And if the admitted facts are insufficient to support the judgment demanded by defendant, the motion is properly refused. *Knaus v. Givens*, 110 Mo. 58, *sub nom.* *Knaus v. Dudgeon*, 19 S. W. 535.

In Washington, it is only in cases where no reply whatever has been filed to the affirmative answer that judgment is authorized, and not where a reply has been actually filed, though found to be insufficient in law. *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393. See also *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

8. Plaintiff's motion for judgment for insufficiency of answer, or because of admitted cause of action.

If defendant has not in his answer denied either of the allegations in the complaint, and has not alleged new matter sufficient to constitute a defense, the plaintiff, if a cause of action is sufficiently alleged in his complaint, is *prima facie* entitled to recover without giving evidence of the truth of his allegations.¹ So, too, where the answer is held frivolous² or evasive.³

And an answer admitting plaintiff's cause of action as good, in part, will authorize a judgment for plaintiff to the extent of the admitted liability.⁴

But partial insufficiency of an affidavit of defense is not an admission of any liability within this rule in Pennsylvania, if it is sufficient as to any part of plaintiff's claim.⁵

¹*Bacon v. Cropsey*, 7 N. Y. 195; *Eaton v. Wells*, 82 N. Y. 576, Affirming 22 Hun, 123; *United States v. Dashiell*, 4 Wall. 182, 185, 18 L. ed. 319, 321. And to the same effect are: *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Benham v. Connor*, 113 Cal. 168, 45 Pac. 258; *Lawrence v. Middle States Loan, Bldg. & Constr. Co.* 7 App. D. C. 161; *Purity Ice Works v. Rountree*, 104 Ga. 676, 30 S. E. 885; *Horn v. Butler*, 39 Minn. 515, 40 N. W. 833; *Norton v. Beckman*, 53 Minn. 456, 55 N. W. 603; *Sweeney v. Schlössinger*, 18 Mont. 326, 45 Pac. 213; *McDonald v. Pincus*, 13 Mont. 83, 32 Pac. 283; *Irish v. Pheby*, 28 Neb. 231, 44 N. W. 438; *Bristol Iron & S. Co. v. Selliez*, 175 Pa. 18, 34 Atl. 309; *First Nat. Bank v. Crosby*, 179 Pa. 63, 36 Atl. 155; *Mantua Hall & Market Co. v. Brooks*, 163 Pa. 40, 29 Atl. 744.

But that an affidavit of defense might be more clear, definite, and particular does not necessarily prove its sufficiency to prevent judgment. *Steiner v. Bartlett*, 2 Pa. Super. Ct. 4.

Whatever the system of pleading may be, it can hardly justify or require the court to give an instruction contrary to law. *Nelson, J. United States v. Dashiell*, 4 Wall. 182, 185, 18 L. ed. 319, 321. And see *Grocers' Bank v. Murphy*, 9 Daly, 510, and cases cited.

The question of the sufficiency of the facts set up in an answer to constitute a good defense, whether tested by demurrer or motion, is fully discussed in the *Brief on the Pleadings*, under appropriate titles.

¹*Vass v. Brewer*, 122 N. C. 226, 29 S. E. 352 (Code, § 388); *First Nat. Bank v. Pearson*, 119 N. C. 494, 26 S. E. 46.

An answer is frivolous within this rule where it is obvious from mere inspection that it contains a defense to no part of the cause of action alleged, and neither raises nor tenders an issue of fact. *Fargo v. Vincent*, 6 S. D. 209, 60 N. W. 858. But not where it denies knowledge or information sufficient to form a belief as to material allegations of the complaint. *Bryne v. Hegeman*, 24 App. Div. 152, 48 N. Y. Supp. 788.

And where it shadows forth a good defense, but states it imperfectly, the defects should be met by a motion calling for an amendment, and not by a motion for judgment on the answer as frivolous. *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422.

And judgment will not be rendered on an answer as frivolous, if an argument is necessary to establish the insufficiency. *German Exch. Bank v. Kroder*, 13 Misc. 192, 34 N. Y. Supp. 133. Nor because part of an answer is frivolous, if another part is held good and raises triable issues. *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y. Supp. 26.

And the rule is equally applicable to a motion for judgment for frivolousness of defendant's demurrer to plaintiff's reply. *Charlton v. Webster*, 44 N. Y. S. R. 117, 17 N. Y. Supp. 539.

²*South Bethlehem School Dist. v. McGovern*, 6 Northampton Co. Rep. 237; *Chapman v. Natalie Anthracite Coal Co.* 11 App. D. C. 386. But not where the objection can be removed by changing the word "when" to "where". *Raker v. Bucher*, 100 Cal. 214, 217, 34 Pac. 654, 849.

³*O'Connor v. Henderson Bridge Co.* 95 Ky. 633, 27 S. W. 251 (Civ. Code, § 380); *McConnell v. First Nat. Bank*, 38 Neb. 252, 56 N. W. 1013.

And this under Pa. act May 31, 1893, without prejudice to plaintiff's right to proceed for the balance. *Jordan v. Kleinsmith*, 5 Pa. Dist. R. 674; *DeMorat v. Entrekin*, 33 W. N. C. 160; *Roberts v. Sharp*, 161 Pa. 185, 28 Atl. 1023.

The operation of this act is not confined to the admission of distinct items, but applies where an amount is admitted to be due on items, all of which are more or less in dispute. *Calkins v. Keely*, 3 Pa. Dist. R. 339. But not where defendant, though admitting certain items, alleges payment of a larger amount on account of his indebtedness to plaintiff, without stating on what items and what account, and the court is unable to determine whether such payment was applied to the admitted or disputed items. *Philadelphia v. Second & T. Streets Pass. R. Co.* 2 Pa. Dist. R. 705.

But the rendition of a judgment on the pleadings without proof, for a larger sum than is admitted to be due by the answer, is erroneous. *Van Eitten v. Kosters*, 48 Neb. 152, 66 N. W. 1106.

Jordan v. Kleinsmith, 5 Pa. Dist. R. 674; *Reilly v. Daly*, 159 Pa. 605, 28 Atl. 493; *New Castle v. New Castle Electric Co.* 2 Pa. Super. Ct. 228; *Myers v. Cochran*, 3 Pa. Dist. R. 135; *Muir v. Shinn*, 2 Pa. Super. Ct. 24; *Ganor v. Hinrichs*, 2 Pa. Super. Ct. 522. But see *Coburn v. Reynolds*, 3 Pa. Dist. R. 475.

But where the answer denies all the material allegations of the petition or complaint plaintiff is not properly entitled to judgment without proof of his cause of action.¹

¹*Jones v. Rowley*, 73 Fed. Rep. 286; *Wagener v. Boyce* (Ariz.) 52 Pac. 1122; *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573; *People ex rel. Atty. Gen. v. Brown*, 23 Colo. 425, 48 Pac. 661; *Tyrer v. Chew*, 7 App. D. C. 175; *Johnson v. Manning*, 2 Idaho, 1073, 29 Pac. 101; *Doyal v. Landes*, 119 Ind. 479, 20 N. E. 719, 21 N. E. 1108; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742; *Wichita Nat. Bank v. Maltby*, 53 Kan. 567, 36 Pac. 1000; *Parks v. Smith*, 155 Mass. 26, 28 N. E. 1044; *Malone v. Minnesota Stone Co.* 36 Minn. 325, 31 N. E. 170; *Wheeler v. Winnebago Paper Mills*, 62 Minn. 429, 64 N. W. 920; *Saville v. Huffstetter*, 63 Mo. App. 273. See *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631; *Van Etten v. Koters*, 48 Neb. 152, 66 N. W. 1106; *Waldron v. Union Trust Co.* 28 App. Div. 156, 50 N. Y. Supp. 891; *Morgan v. Roper*, 119 N. C. 367, 25 S. E. 952; *Willis v. Holmes*, 28 Or. 265, 42 Pac. 989; *Hummel v. Lilly*, 188 Pa. 463, 41 Atl. 613; *Newton Rubber Co. v. Kahn*, 186 Pa. 306, 40 Atl. 483; *Townsend v. Price*, 19 Wash. 415, 53 Pac. 668; *Port Townsend S. R. Co. v. Weir*, 15 Wash. 507, 46 Pac. 1044; *State ex rel. Perkins v. Sheridan County* (Wyo.) 51 Pac. 204.

And failure of the answer to deny an immaterial fact does not take the case out of this rule. *McKenzie v. Poorman Silver Mines*, 60 U. S. App. 1, 88 Fed. Rep. 111, 31 C. C. A. 409.

A motion for judgment because the answer was not verified was held to be not strictly proper practice in *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891, the better practice being to move to strike out the unverified answer and for judgment as for default.

9. — test of sufficiency.

On a motion for judgment for insufficiency of the affidavit of defense, the matters presented by the claim and affidavit are all that can be considered.¹

¹*Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709. Either in support of or against the defense disclosed by the affidavit. *Allegheny v. McCaffrey*, 131 Pa. 137, 18 Atl. 1001.

But the reasonableness or unreasonableness of the statements therein is not before the court. *Rockwell Mfg. Co. v. Cambridge Springs Co.* 191 Pa. 386, 43 Atl. 327.

And affidavits of third persons cannot be considered under a rule of court providing only for affidavits by plaintiff and defendant. *The Richmond v. Cate*, 1 App. D. C. 447.

But a Federal court may take judicial notice of a judgment of a state not within its jurisdiction, holding valid and regular the judgment on which the suit before it is based. *Ball v. Warrington*, 87 Fed. Rep. 695.

10. — motion, when to be made.

A motion for judgment for insufficiency of the answer should be made before plaintiff has adduced evidence to prove his cause of action.¹

¹*Tevis v. Hicks*, 41 Cal. 123.

11. — waiver of right to move.

The right to judgment for insufficiency of an adversary's pleading may be waived by not moving therefor¹ at the proper time.²

¹*Louisville & N. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179.

²*Green v. Raymond*, 14 N. Y. Week. Dig. 322.

12. — exception to ruling.

Granting a motion seasonably made¹ is a matter, not of discretion, but of legal right, if the answer or affidavit of defense is held insufficient and no amendment sought.² And error in denying it is not waived by afterwards proceeding to trial.³

¹Such a motion will not be considered on appeal, if it was not made at trial. *United States ex rel. Search v. Choctaw, O. & G. R. Co.* 3 Okla. 404, 41 Pac. 729.

²*Johnson v. Wright*, 2 App. D. C. 216. And a judgment of refusal which is clearly improper will be reversed. *No. 2 Assistance Bldg. & L. Asso. v. Wampole*, 6 Pa. Super. Ct. 238. But the error in law must be apparent. *Ferree v. Young*, 6 Pa. Super. Ct. 307.

In some states a judgment showing by its recitals that it was rendered on the pleadings on plaintiff's motion, without trial of the issues, may be reviewed without a bill of exceptions setting forth the facts recited. *Weeks v. Garibaldi South Gold Min. Co.* 73 Cal. 599, 15 Pac. 302. See also *Power v. Gum*, 6 Mont. 5, 9 Pac. 575 (holding formal exception to a denial unnecessary).

It will not be disturbed, however, because there is inserted in the transcript what purports to be a notice of the hearing of the motion on an earlier day than that mentioned in the judgment, and which was a legal holiday, in the absence of a bill of exceptions showing that such notice was the one pursuant to which the motion was finally heard. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755.

But in *Evans v. Paige*, 102 Cal. 132, 36 Pac. 406, denial of such a motion was

held reviewable only on appeal from the judgment, and not on appeal from an order denying the party's motion for a new trial.

On appeal from a ruling on such a motion the only question is as to whether the answer or affidavit defense raises any issue for trial. *East River Electric Light Co. v. Clark*, 45 N. Y. S. R. 635, 18 N. Y. Supp. 463; *Aetna Ins. Co. v. Confer*, 158 Pa. 598. And, according to *Sullivan County v. Middendorf*, 7 Pa. Super. Ct. 71, a judgment for want of sufficient affidavit of defense will be reversed on appeal if the declaration fails to state a cause of action.

Power v. Gum, 6 Mont. 5, 9 Pac. 575. But *Becker v. Simons*, 3 Neb. 680, 50 N. W. 1129, holds that error in denying a motion is waived by pleading anew and going to trial on the merits.

13. Motion to compel election.

If incompatible causes of action or defenses¹ are stated in the same pleading, the court may, at the trial² compel the party to elect between them.

But an objection to the restating of the same contract or grievance in different forms or under different aspects cannot avail to exclude evidence at the trial.³

But a plaintiff who sets out causes of action which are identical, one merely setting out the facts more fully than the other, cannot be required to elect between them; the appropriate remedy being to move to strike out one of the causes as surplusage.⁴

A party ought not to be compelled to elect, before evidence has been given, between two causes of action or defenses unless they are absolutely inconsistent, that is to say, incompatible; nor even where they are, if his case be such that he is entitled to a discovery, at the trial, as to the facts necessary to enable him to elect. The present practice sanctions a pleader in asking alternative relief on the same facts; and in supporting the same claim by stating facts in several counts or causes of action, although success upon one will supersede any right to recover on the other share of his claim. The inconsistency which is ground for compelling election is an absolute incompatibility in the facts alleged, not a mere superfluity of grounds for recovery, nor a mere alternative in legal results arising on such doubts as it may be a part of the object of the trial to investigate and determine.⁵

The better opinion is that where a plaintiff has really two distinct and separate grounds for claiming the relief demanded in the complaint, and states each one therein separately and plainly, or where he is somewhat uncertain as to the exact ground of recovery the proof may afford, he may frame a complaint for the recovery of a single

claim in several distinct counts or statements, and the court will not compel him to elect between them.⁶

¹*Southworth v. Bennett*, 58 N. Y. 659. In *Fadley v. Smith*, 23 Mo. App. 87, the law is stated to be that where causes of action which may properly be joined in one petition are placed in one count instead of being separately stated in separate counts, the remedy is by motion to compel plaintiff to elect one, and to strike out the remaining causes improperly joined. And in *Dooley v. Missouri P. R. Co.* 36 Mo. App. 381, a motion to elect was held the proper and only practice to reach improper mingling or joining of two or more causes of action in a count. See also *Brown v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 427; *Dougherty v. Wabash, St. L. & P. R. Co.* 19 Mo. App. 419; *Alexander v. Thacker*, 30 Neb. 614, 46 N. W. 825. But *Austin, T. & W. Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445, holds such motion inappropriate as to a plaintiff who failed to state separately several causes of action as required by a South Dakota statute.

But the right to make the election ordered rests with the party, and cannot be exercised by the court. *Stewart v. Huntington*, 124 N. Y. 127, 26 N. E. 289. See also *Shannon v. Rester*, 69 Miss. 238, 13 So. 587. Nor by the party asking for the election. See *Brown v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 427.

And for illustrative cases requiring an election by plaintiff between incompatible causes of action stated in the complaint, see *Matz v. Chicago & A. R. Co.* 88 Fed. Rep. 770; *Burgett v. Grider*, 54 Ark. 560, 16 S. W. 573; *Seymore v. Rice*, 94 Ga. 183, 21 S. E. 293; *Louisville & N. R. Co. v. Kellum*, 13 Ky. L. Rep. 225; *Alsop v. Central Trust Co.* 100 Ky. 375, 38 S. W. 510; *Brady v. Ludlow Mfg. Co.* 154 Mass. 468, 28 N. E. 901; *Roberts v. Quincy, O. & K. C. R. Co.* 43 Mo. App. 287; *Stokes v. Behrenes*, 23 Misc. 442, 52 N. Y. Supp. 251; *Wiley v. Cleveland, C. C. & St. L. R. Co.* 4 Ohio Dec. 269; *Reed v. Northeastern R. Co.* 37 S. C. 42, 16 S. E. 289; *Shanks v. Mills*, 25 S. C. 358; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309.

²*Southworth v. Bennett*, 58 N. Y. 659; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486; *Ruff v. Columbia & G. R. Co.* 42 S. C. 114, 20 S. E. 27. See also *Stokes v. Behrenes*, 23 Misc. 442, 52 N. Y. Supp. 251, sustaining the practice of moving before answer.

But *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348, holds that when the inconsistency is apparent on the face of the complaint defendant should, before answering, move that plaintiff be compelled to elect; and if he lies by until trial, and then moves, the court may, in its discretion, wait until part or all the evidence is in before ruling on the motion, and that its decision will not be reviewed when it appears that defendant was not harmed.

So in *Boemer v. Central Lead Co.* 69 Mo. App. 601, an action by a widow for the negligent killing of her husband, plaintiff, as between the counts of the petition, one of which was founded on a special statute and the other on the general damage act, was not compelled to elect before trial, but was held to have the right to elect at the close of the testimony, if required, by instructions to the jury, which was, in effect, done by an instruction to find for the defendant on the first count.

**Gillett v. Borden*, 6 Lans. 219, 221; *Tregent v. Maybee*, 51 Mich. 191, 16 N. W. 374; *Kelly v. Bernheimer*, 3 Thomp. & C. 140; *American Dock & Improv. Co. v. Staley*, 8 Jones & S. 539; *Newton v. Cecil*, 19 Ky. L. Rep. 1430, 43 S. W. 734; *Remy v. Olds* (Cal.) 21 L. R. A. 645, 34 Pac. 216; *Cawker City State Bank v. Jennings*, 89 Iowa, 230, 56 N. W. 494.

In *Manders v. Craft*, 3 Colo. App. 230, 32 Pac. 836, whether or not a repetition of a cause of action in a different form is unnecessary and will require an election under the Code was held discretionary with the trial judge.

**Pollock v. Whipple*, 45 Neb. 844, 64 N. W. 210. But compare *Shenners v. West Side Street R. Co.* 74 Wis. 447, 43 N. W. 103.

*But on this question rulings adverse to this view have often been made. Compare, for instance, *Walters v. Continental Ins. Co.* 5 Hun, 343; *Roberts v. Leslie*, 14 Jones & S. 76; *Comstock v. Hoeft*, 1 Month. L. Bull. 43; *Brinkman v. Hunter*, 73 Mo. 172, 39 Am. Rep. 492; *Chicago & A. R. Co. v. Smith*, 10 Ill. App. 359; *Clapp v. Campbell*, 124 Mass. 50; *Sullivan v. Fitzgerald*, 12 Allen, 482; *Gardner v. Locke*, 2 N. Y. Civ. Proc. Rep. 252; *Dickens v. New York C. R. Co.* 13 How. Pr. 228, and cases cited. *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724 (classifying conflicting authorities).

*So held, in an action against an insurance company for the loss of property by fire, the complaint alleging, first, the issue of a policy thereon, and, second, a contract by defendant to insure and to issue a policy. *Velie v. Newark City Ins. Co.* 12 Abb. N. C. 309, 65 How. Pr. 1. To the same effect in a negligence case. *Railway Co. v. Hedges* (Ohio Com. June, 1884) 11 Week. L. Bull. 326.

In *Bruce v. Burr*, 67 N. Y. 237, it is held that the Code allows a defendant to put in as many defenses or counterclaims as he may have, and the objection of inconsistency between them is not available. In this case the exception was to the referee's refusal to compel defendant to elect between his original defense (which was rescission for false representations) and a defense added by leave of court (*viz.*, a counterclaim for false warranty). It was held not error to refuse to compel defendant to elect. It is not held that if the allegations of act had been incompatible it would have been error to compel election.

The courts are never bound to give a party time both to prove and disprove the same thing.

For illustrative cases of the rule stated in the text, see *American Nat. Bank v. National Wall Paper Co.* 40 U. S. App. 646, 77 Fed. Rep. 85, 23 C. C. A. 33; *Cowan v. Abbott*, 92 Cal. 100; *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.* 63 Conn. 551, 25 L. R. A. 856, 29 Atl. 76; *Plano Mfg. Co. v. Parmenter*, 30 Ill. App. 569; *Trench v. Hardin County Canning Co.* 168 Ill. 135, 48 N. E. 64; *Perrin v. Lebus*, 14 Ky. L. Rep. 26, 18 S. W. 1010; *Turner v. Johnson*, 18 Ky. L. Rep. 202, 31 S. W. 1087; *McNair v. Gourrier*, 40 La. Ann. 353, 4 So. 310; *Beauregard v. Webb Granite & Constr. Co.* 160 Mass. 201, 35 N. E. 555; *Cadwell v. Corey*, 91 Mich. 335, 51 N. W. 888; *Antenrieth v. St. Louis & S. F. R. Co.* 36 Mo. App. 254; *Globe Light & Heat Co. v. Doud*, 47 Mo. App. 439; *Follett v. Brooklyn Elev. R. Co.* 91

Hun, 296, 36 N. Y. Supp. 200; *Building & Sav. Co. v. Bank*, 3 Ohio Dec. 689; *Farley v. Charleston Basket & Veneer Co.* 51 S. C. 222, 28 S. E. 193, 401; *Shenners v. West Side Street R. Co.* 74 Wis. 447, 43 N. W. 103; *Marshall v. Rugg* (Wyo.) 33 L. R. A. 679, 44 Pac. 700.

14. — inconsistent defenses.

A defendant may, as a general rule, unless expressly prohibited by statute, plead as many defenses as he may have; and a plea or defense separately pleaded in an answer, though it contain several matters, should be consistent as to these; but a plea or defense, regarded as an entirety, if otherwise sufficient in form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded; hence the rule that a defendant, though his defense be utterly inconsistent, cannot be compelled to elect between them, nor can evidence under either be excluded because of the inconsistency.¹ This rule does not, however, obtain in some states.²

Thus, the New York Code of Civil Procedure expressly provides that a defendant may set forth in his answer as many defenses or counterclaims, or both, as he may have. But a ruling requiring an election between a defense and a counterclaim on the ground of inconsistency is not ground of error, where the facts stated as constituting the counterclaim, which was abandoned, do not state a valid counterclaim. *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468, 34 N. E. 193.

And for further cases where defendant was not compelled to elect between defenses interposed, see *Buhne v. Corbett*, 43 Cal. 264; *Barr v. Hack*, 46 Iowa, 308; *Lane v. Bryant*, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 534; *Weingartner v. Louisville & N. R. Co.* 19 Ky. L. Rep. 1023, 42 S. W. 839; *Stebbins v. Lardner* (S. D.) 48 N. W. 847; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 764.

¹*Minnesota is a notable exception* to this rule. The Code of that state has the same provision as the New York Code of Civil Procedure, but in *Derby v. Gallup*, 5 Minn. 119, the practice of allowing inconsistent defenses was vigorously condemned, the court insisting that the provision of the Code allowing the defendant "to set forth by his answer as many defenses as he shall have" must be understood with the restriction that those defenses must be true—that they must be such as the facts to be proved will sustain.

So, in *Kansas and Missouri*, the rule is settled that a motion to compel defendant to elect between inconsistent defenses will prevail, notwithstanding the Code providing, as in New York, that defendant may plead all the defenses he may have. *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988; *Sherman v. Rockwood*, 26 Mo. App. 407. See also *Auld v. Butcher* 2 Kan. 159; *Butler v. Kaulback*, 8 Kan. 672.

And on a trial *de novo* in the district court on appeal from a justice, defendant's statement that he will offer evidence to support two separate defenses has the same effect as if the two defenses had been set up by answer or bill of particulars, empowering the court to compel him to

elect between them if they are inconsistent, even though by the Code he is not required to file any pleadings in either the justice's or district court, unless they are demanded by plaintiff. *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988. See also *Sherman v. Rockwood*, 26 Mo. 403.

Defenses are inconsistent, within the rule requiring election between them by defendant, when they are so contradictory of each other that some of them must necessarily be false. *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *State use of Cooley v. Samuels*, 28 Mo. App. 649. Thus, where defendant denies positively the allegations of the complaint, and then pleads, as a defense thereto, new matter in the nature of confession and avoidance, the denial and new matter are not necessarily inconsistent with each other, as it is possible for both of them to be true. *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969. But a defense that the contract in suit was a mere joke is inconsistent with the defense of breach of warranty. *Sherman v. Rockwood*, 26 Mo. App. 403. See, also, for instances of cases holding the defenses not inconsistent, *DeLissa v. Fuller Coal & Min. Co.* 59 Kan. 319, 52 Pac. 886; *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454; *Cavitt v. Tharp*, 30 Mo. App. 131.

15. — waiver of objection.

Failure to move at the proper time to compel plaintiff to elect on which cause of action he will rely waives the objectionable statement of incompatible causes of action in the same complaint or petition.¹

National Security Bank v. Butler, 129 U. S. 223, 32 L. ed. 682, 9 Sup. Ct. Rep. 281; *Bowen v. Carolina, C. G. & C. R. Co.* 34 S. C. 217, 13 S. E. 421; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250; *Hardigen v. Simpkins*, 19 Ky. L. Rep. 1376, 43 S. W. 410; *Walters v. Hamilton*, 75 Mo. App. 237.

And the court may properly submit to the jury both causes of action on each count. *Joy v. Bitzer*, 77 Iowa, 73, 3 L. R. A. 184, 41 N. W. 575.

And in *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421, it was said that a defendant, by delaying the motion till the opening of the trial, might fairly be regarded as waiving the objection, and it was held to be discretionary with the trial court to allow the motion.

But in *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364, 42 Pac. 943, judgment was reversed because it could not be sustained on any of the remedies sought, or by combining any of them not inconsistent with each other, though defendant had not moved at trial to compel plaintiff to elect; but it was said that the judgment would not have been disturbed if it could have been so upheld.

16. — misjoinder.

The misjoinder of causes of action or defenses not appropriate to be united in the same pleading, unless they are such as to require different modes of trial,¹ is not an incompatibility within the above rule. and will not sustain a motion at the trial to compel the party to elect.²

¹Thus, in *Schnieder v. Kirkpatrick*, 72 Mo. App. 103, plaintiff, whose petition set up a cause of action at law, and also one at equity, was held to have been properly required to elect which he would try first, since one was triable by jury and the other by the court without a jury.

²*Lee Bank v. Kitching*, 7 Bosw. 664, 11 Abb. Pr. 435; *Sherman v. Inman Steamship Co.* 26 Hun, 107; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 263.

17. — exception to ruling.

An exception lies to a decision on a motion made at trial to compel election between incompatible causes of action or defenses stated in the same pleading.¹

¹But such a motion to compel plaintiff to elect is so far discretionary that it will not be reviewed when it appears that defendant was not harmed. *Tuhill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348. See also *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421.

But *Milbauer v. Schotten*, 95 Wis. 28, 69 N. W. 984, holds that an order denying the motion is not appealable, as it is not included in the Wisconsin statute regulating appeals from orders entered before judgment.

The motion should be set out in the transcript on appeal, in Montana, together with the order of denial by bill of exceptions or otherwise, and a mere reference to it in the affidavits, on the motion to set aside a default judgment against defendant, is insufficient. *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303.

Barnes v. Scott, 29 Fla. 285, 11 So. 48, however, holds that a requirement of the court that defendant elect between two pleas, followed by the required election, is apparent on the face of the record, and requires no exception to render it reviewable on appeal.

Harmless error.—But a ruling requiring plaintiff to elect at the close of her evidence on which count she will rely is harmless error where there is no evidence to go to the jury on the abandoned count. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472, 33 N. E. 499; *Conroy v. Clinton*, 158 Mass. 318, 33 N. E. 525. Or if plaintiff is not entitled to recover on either count. *May v. Whittier Mach. Co.* 154 Mass. 29, 27 N. E. 768. Or where evidence was taken on both causes of action. *Thomas v. Turner*, 18 Ky. L. Rep. 209, 35 S. W. 1035; *Estep v. Hammons*, 20 Ky. L. Rep. 448, 46 S. W. 715. Or where the evidence affirmatively discloses that the abandoned count could not, under the facts, lead to recovery. *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981.

And defendant is not prejudiced by denial of his motion to compel plaintiff to elect, where plaintiff was permitted to give evidence as to one cause of action only, and the instructions confined the damages to be awarded to that. *Pinnell v. St. Louis, A. & T. R. Co.* 49 Mo. App. 170. Or where though they are substantially the same, but one is tried, though proof required for one would support the other. *Freet v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. App. 548. Or where the recovery is for one only, though proof is adduced in support of both. *Cram v. Springer Litho-*

graphing Co. 10 Misc. 660, 30 N. Y. Supp. 1130. And where an election is made on renewal of the motion at opening of the trial. *Van Hook v. Burns*, 10 Wash. 22, 38 Pac. 763.

18. — assessing damages.

When the court directs judgment on the pleadings the jury may, under the direction of the court, assess the damages.¹

¹N. Y. Code Civ. Proc. § 1183, last clause. See also *Cowart v. Stanton*, 104 Ga. 520, 30 S. E. 743; *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. 37. But compare *Humboldt Min. Co. v. Variety Iron Works Co.* 22 U. S. App. 334; *Humboldt Min. Co. v. American Mfg. Min. & Mill. Co.* 62 Fed. Rep. 356, 10 C. C. A. 415.

19. Motion to strike out.

Irrelevant, redundant, scandalous, and other improper matter does not vitiate a good pleading¹ and may be stricken out;² but the objection is waived unless raised by motion to strike out³ interposed before demurrer or answer,⁴ or within the time fixed by rules of court,⁵ and cannot be taken by motion at the trial.⁶

For the purposes of the motion, the truth of all facts well pleaded are deemed true, as on demurrer.⁷

The question whether a pleading, or parts of it, are irrelevant, redundant, scandalous, and the like, whether tested by demurrer or motion, is fully treated in the *Brief on the Pleadings*, under the appropriate titles; and the following text and notes will be limited, therefore, to a treatment of the motion to strike, solely with reference to its propriety and exclusiveness as such to reach the defect, and when it shall be made.

*Thus, under the New York Code of Civil Procedure irrelevant, redundant, or scandalous matter contained in a pleading may be stricken out upon the motion of a person aggrieved thereby. *Armstrong v. Phillips*, 60 Hun, 243, 14 N. Y. Supp. 582. But allegations will not be stricken out as irrelevant, unless the irrelevancy is clear, and there is more than a barely possible danger of false issues. *Finger v. Kingston*, 29 N. Y. S. R. 703, 9 N. Y. Supp. 175.

The practice does not extend to striking out an answer or part thereof as frivolous. If the entire pleading is frivolous the party aggrieved may move for judgment thereon, and that is the only proper practice. *Owens v. Hudnut's Pharmacy*, 35 N. Y. S. R. 567, 12 N. Y. Supp. 700.

But *Fosdick v. Kingdoods*, 5 Ohio N. P. 330, holds that a plea frivolous, equivocal, and evasive should be stricken out of the answer or from the files on motion.

And the burden of proof is upon the moving party to show that he is aggrieved. *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545.

Power is inherent in courts, according to *Christie v. Drennon*, 1 Ohio Dec. 374, to strike from the files frivolous or sham pleadings, both at law and

in equity, and exists although not expressly given by statute. It is, however, a discretionary power. *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444. See *post*, § 20. But they have neither inherent nor statutory power, according to *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315, to strike denials out from an answer as sham and frivolous, although they have both inherent and statutory power to strike sham and frivolous answers.

*For exclusiveness of the remedy, as against a demurrer, to reach such defects, see generally: *Henry v. United States*, 22 Ct. Cl. 75; *Cole v. Tuck*, 108 Ala. 227, 19 So. 377; *Davis v. Louisville & N. R. Co.* 103 Ala. 660, 18 So. 687; *Milligan v. Pollard*, 112 Ala. 465, 20 So. 620; *Springfield F. & M. Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995; *Hagely v. Hagely*, 68 Cal. 348, 9 Pac. 305; *Camp v. Hall*, 39 Fla. 535, 22 So. 792, and cases cited; *Smith v. Champion*, 102 Ga. 92, 29 S. E. 160; *Reel v. Lane*, 96 Iowa, 454, 65 N. W. 380; *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Hershiser v. Delone*, 24 Neb. 380, 38 N. W. 863; *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887; *Armstrong v. Phillips*, 60 Hun, 243, 14 N. Y. Supp. 582; *Fosdick v. Kingdoods*, 5 Ohio N. P. 330.

Special demurrer was held the appropriate remedy to reach a material averment defectively stated, and not a motion to strike out, in *Swain v. Burnetta*, 76 Cal. 299, 18 Pac. 394.

The sufficiency of a defense, whether as a whole, or one fact pleaded as such, is to be tested by demurrer, and not by motion to strike out. *Smith v. American Turquoise Co.* 77 Hun, 192, 28 N. Y. Supp. 329; *Nordlinger v. McKim*, 38 N. Y. S. R. 886, 14 N. Y. Supp. 515; *Kelly v. Ernest*, 26 App. Div. 90; *Silsby v. Tacoma, O. & G. H. R. Co.* 6 Wash. 295, 32 Pac. 1067. See also *Humble v. McDonough*, 5 Misc. 508, 25 N. Y. Supp. 965. The motion to strike out the entire defense being available only when it is shown to be sham or irrelevant, or a portion redundant, immaterial, or insufficient. *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361.

A petition is to be stricken from the files at the discretion of the court, and not at the option of the adverse party, for failure of the party filing the petition to file a copy for the use of the adverse party, as required by a rule of court. *Searles v. Lux* (Iowa) 52 N. W. 327; *Searles v. Haag* (Iowa) 52 N. W. 328.

**Nieukirk v. Nieukirk*, 84 Iowa, 367, 51 N. W. 10 (holding any error in refusing the motion was waived by demurrer subsequently filed assailing the pleading on its merits, although both motion and demurrer are based on the same ground).

Holt County v. Cannon, 114 Mo. 514, 21 S. W. 851 (holding that any error in refusing the motion was waived and not available on appeal when defendant answered over to the merits). See also *Atty.-Gen. v. London & N. W. R. Co.* [1892] 3 Ch. 274; *Pitkin v. New York & N. E. R. Co.* 64 Conn. 482; *Voorheis v. Eiting*, 15 Ky. L. Rep. 161, 22 S. W. 80; *Paddock v. Somes*, 102 Mo. 226, 10 L. R. A. 254, 14 S. W. 746.

*In New York it is required by a rule of court that motions to strike out must be noticed before demurrer or answer, and within twenty days from service of the pleading assailed. Rule 22, General Rules of Practice, App. Div. (Hun's ed. 1896) p. 103. *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y.

Supp. 26. See also *New York Ice Co. v. Northwestern Ins. Co.* 21 How. Pr. 234, 12 Abb. Pr. 74; *Roosa v. Saugerties & W. Turnp. Road Co.* 8 How. Pr. 237; *Barber v. Bennett*, 4 Sandf. 705; *Walker v. Granite Bank*, 1 Abb. Pr. N. S. 406.

**Smith v. Countryman*, 30 N. Y. 655; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. And see *Richmond & D. R. Co. v. Worley*, 92 Ga. 84, 18 S. E. 361. So a motion to strike, interposed at the commencement of a second trial, after reversal on appeal, the first trial having been had without any such motions made, comes too late, the delay operating as waiver of the objection. *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132.

As to the propriety of motions to strike, as applied to trial amendments, compare *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192; *Security Nat. Bank v. Latimer*, 51 Neb. 498, 71 N. W. 38; *Hobbs v. First Nat. Bank*, 15 Tex. Civ. App. 398, 39 S. W. 331; *Nelson v. Hays*, 75 Iowa, 671, 37 N. W. 177.

**Paddock v. Somes*, 102 Mo. 226, 10 L. R. A. 254, 14 S. W. 746; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833.

The test of the materiality of averments in a pleading on a motion to strike out is whether they tend to constitute a cause of action or defense; and, if taken as true, they do, it is error to strike the portion assailed. *Atkinson v. Wabash R. Co.* 143 Ind. 501, 41 N. E. 947, and cases cited. Unless the same facts are admissible under another paragraph of the pleading. *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833. See also *Gilbert v. Loberg*, 86 Wis. 661, 57 N. W. 982.

But the rule which obtains on the argument of general demurrers of examining the whole record does not apply in deciding motions to strike out, according to *Wilson v. Johnson* (N. J. L.) 29 Atl. 419; and, although it may be defective, a count in the declaration cannot be considered.

And in *Davis v. Louisville & N. R. Co.* 108 Ala. 660, 18 So. 687, it is held that a motion to strike out a plea as frivolous cannot be made to take the place of a demurrer.

20. — discretion of court.

A motion to strike out is addressed to the sound judicial discretion of the trial court, and, though causes for its allowance exist, refusal of the court to allow it is not reviewable error.¹

¹As the party pleading can take nothing on the trial by reason of improper matter, no injury can result to the adverse party from refusal of the motion. *Davis v. Louisville & N. R. Co.* 108 Ala. 660, 18 So. 687. See also *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444, citing *Drake v. Ft. Scott First Nat. Bank*, 33 Kan. 639, 7 Pac. 219.

It should use this power with reluctance and caution. There is little benefit in motions of this kind, and there may be much harm. Immaterial evidence can always be rejected at the trial. *Essex v. New York & C. R. Co.* 8 Hun, 361.

But denial of the motion does not involve the merits of the action or involve a substantial right. *Emmens v. McMillan Co.* 21 Misc. 638, 47 N. Y. Supp. 1099. See also *Dunton v. Hagerman*, 18 App. Div. 146, 46 N. Y. Supp. 758; *Hatch v. Matthews*, 85 Hun, 522, 33 N. Y. Supp. 332; *Dunkirk v. Lake Shore & M. S. R. Co.* 75 Hun, 366, 27 N. Y. Supp. 105.

21. Motion to make more definite and certain.

As a general rule, indefiniteness and uncertainty in a pleading¹ is reached only by a motion to make the pleading more definite and certain;² but the objection is waived unless taken by appropriate remedy, during the time allowed for pleading,³ or before the party has noticed the cause for trial,⁴ but cannot be taken by motion at the trial.⁵

And a motion filed out of time may, on application of the adverse party, be stricken from the files.⁶

¹The sufficiency of pleadings in this respect, generally, is discussed in the *Brief on the Pleadings*, in appropriate places; this section being limited in its scope to the propriety of the remedy, and when the objection may be raised with reference to the trial.

²As to exclusiveness of the remedy, see, generally, *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783; *Thomson v. Madison Bldg. & Aid Asso.* 103 Ind. 279, 2 N. E. 735; *Roe v. Elk County Comrs.* 1 Kan. App. 219, 40 Pac. 1082; *Gfeller v. Graefemann*, 64 Mo. App. 162; *Dexter v. Fulton*, 86 Hun, 433, 33 N. Y. Supp. 901; *Stokes v. Taylor*, 104 N. C. 394; *Giroux Amalgamator Co. v. White*, 21 Or. 435, 28 Pac. 390; *Long v. Hunter*, 48 S. C. 179, 26 S. E. 228; *Fares v. Gleason*, 14 Wash. 657; *Dr. Shoop Family Medicine Co. v. Wernich*, 95 Wis. 764, 70 N. W. 160.

In *Kellogg v. Baker*, 15 Abb. Pr. 286, this motion was said to be a substitute for a special demurrer, which formerly discharged the same office.

And some of the courts still hold to the special demurrer. *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *Randall v. Rosenthal* (Tex. Civ. App.) 31 S. W. 822.

³As before demurrer. *Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411; *Burr v. Brantley*, 40 S. C. 538, 19 S. E. 199; *Van Etten v. Medland*, 53 Neb. 569, 74 N. W. 33.

Or before plea to the merits. *Huntington v. Mendenhall*, 73 Ind. 460; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Weaver v. Harlan*, 48 Mo. App. 319; *Huber v. Wilson*, 33 N. Y. S. R. 849, 11 N. Y. Supp. 377; *Pugh v. White*, 78 Ky. 210; *Williams v. Myers*, 18 Pa. Co. Ct. 416; *Gaines v. Summers*, 39 Ark. 482.

But a stipulation extending the time to answer or demur does not waive the right. *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224.

⁴*Kellogg v. Baker*, 15 Abb. Pr. 286.

⁵*Nischke v. Wirth*, 66 Wis. 319, 28 N. W. 342; *St. Louis & S. F. R. Co. v. Snavely*, 47 Kan. 637, 28 Pac. 615. See also *Stickney v. Blair*, 50 Barb. 341.

All mere technical or formal objections—and these include indefiniteness and uncertainty—must be raised by appropriate remedy before trial; otherwise, they are waived. *Orman v. Mannix*, 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037; *Chesterson v. Munson*, 27 Minn. 498, 8 N. W. 593; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445. And see *Folsom v. Brawn*, 25 N. H. 114.

And such defects in pleading cannot be questioned by oral demurrer at the opening of the trial. *Glaspie v. Keator*, 56 Fed. Rep. 203. Nor by oral demurrer at trial objecting to the introduction of any evidence under the pleading. *Weaver v. Harlan*, 48 Mo. App. 319; *Hurst v. Ash Grove*, 96 Mo. 168, 9 S. W. 631; *Armstrong v. Danahy*, 75 Hun, 405, 27 N. Y. Supp. 60. And see *Stickney v. Blair*, 50 Barb. 341.

**Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411.

IV.—THE RIGHT TO OPEN AND CLOSE.

1. Who entitled to.
2. Application of the rule.
3. — several issues.
4. — several defendants.
5. Defendant's right by virtue of admission in pleading.
6. Admission offered at the trial.
7. Unessential allegation.
8. Plaintiff's right by admitting defendant's case.
9. Refusal of the right, error.
10. Duty to begin.
11. Waiver of the opening and closing.

1. Who entitled to.

If plaintiff has to give any evidence in order to be entitled to a verdict for the amount claimed, he has the right to begin by opening the case to the jury and adducing his evidence first.¹

This is the only sound rule under the new procedure. It is fully established in practice in the state of New York, and, I believe, is also in force, or has been recognized in principle to a greater or less extent, in the states indicated below, as well as in England.

England—*Mercer v. Whall*, 5 Q. B. 447, 9 Jur. 576.

Arkansas—*Sillivant v. Reardon*, 5 Ark. 140; *Pogue v. Joyner*, 7 Ark. 462; *Pierce v. Lyman*, 28 Ark. 550; *Bertrand v. Taylor*, 32 Ark. 470, 476.

Georgia—*McKibbin v. Folds*, 38 Ga. 235.

Indiana—*Aurora v. Cobb*, 21 Ind. 492; *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436, 444; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251, 7 Am. Rep. 225; *Camp v. Brown*, 48 Ind. 575. But held otherwise in actions of tort in Indiana. *Heilman v. Shanklin*, 60 Ind. 424.

Kansas—*Perkins v. Ermel*, 2 Kan. 325.

Maine—*Johnson v. Josephs*, 75 Me. 544, where the rule is clearly stated.

Missouri—*Elder v. Oliver*, 30 Mo. App. 575, where a large number of cases is cited.

Nebraska—*Rolfe v. Pilloud*, 16 Neb. 21, 19 N. W. 615; *Mizer v. Bristol*, 36 Neb. 138, 46 N. W. 293.

New York—See cases cited under next point, and *Katz v. Kuhn*, 9 Daly, 166, as qualified in 32 Moak Eng. Rep. 276, note; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

North Carolina—*Love v. Dickerson*, 85 N. C. 5.

Ohio—*Dille v. Lovell*, 37 Ohio St. 415 (a well-considered case).

South Carolina—*Burckhalter v. Coward*, 16 S. C. 435.

Vermont—See reasoning in *Goss v. Turner*, 21 Vt. 437.

Virginia—*Young v. Highland*, 9 Gratt. 16 (a well-considered case).

It has been held in Alabama, California, Maryland, and Massachusetts that the plaintiff has the right to open and close in all cases. *Chamberlain v. Gaillard*, 26 Ala. 504; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Townshend v. Townshend*, 7 Gill, 10, 25; *Dorr v. Tremont Nat. Bank*, 128 Mass. 349.

Except in Massachusetts, in an avowry for rent in replevin, where the practice was said to be not uniform. *Page v. Osgood*, 2 Gray, 260. *

The books abound in conflicting authorities under the common-law procedure, where it was sought to settle the question on theoretic considerations and in view of artificial rules of pleading which often made it difficult to determine who had the affirmative. The question, Who has the affirmative of the issue? if it be applied as the test, will generally lead to the above conclusion; but as there are cases in which a legal presumption supplies the place of evidence to establish that affirmative, and other cases in which the party having the negative has the burden of giving evidence because the facts are peculiarly within his knowledge, that rule does not serve as a guide to the right to open and close, unless close attention is paid to its exceptions. The little volume of Best on the Right to Begin—an admirable analysis of conflicting authorities and deduction of resulting rules—is not a safe guide under the new procedure.

The only substantial question raised by the recent American authorities touching this point is whether the necessity of evidence in order to establish the amount of damages, when the existence of a cause of action is admitted, entitles the plaintiff to begin, or whether he must, in such case, wait until defendant has adduced evidence in support of his justification, or other affirmative defense. The latter has been held to be the rule in Illinois, Indiana, New Hampshire, South Carolina, and Kentucky. *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126, 134; *McLees v. Felt*, 11 Ind. 218, 220 (and see above); *Seavy v. Dearborn*, 19 N. H. 351; *Moses v. Gatewood*, 5 Rich. L. 234 (But in *Burckhalter v. Coward*, 16 S. C. 435, 443, there is a *dictum* saying, "It seems that in all actions for unliquidated damages for personal injuries, libel, and slander, the plaintiff opens and replies"); *M'Kenzie v. Milligan*, 1 Bay, 248; *Goldsberry v. Stuteville*, 3 Bibb. 345.

But when the plaintiff has to prove his cause of action as well as his damages he is required to give his evidence on both points while presenting his case in chief, and cannot reserve his evidence as to damages until rebuttal. Where an admission takes the place of evidence as to the cause of action, the rule of convenience in respect to proving damages remains unchanged. It has been said in support of the other view that

when a cause of action is admitted, it is then for defendant to attempt to establish his justification or other affirmative defense, and if he fails the case stands as if there were a default, and plaintiff can thereupon give evidence to assess his damages. The fallacy of this is that if defendant gives any substantial evidence in support of his affirmative defense it cannot be known whether he has sustained it or not until the verdict is received. Hence, the most convenient time practically to prove damages is also the most appropriate theoretically,—before defendant opens; and if defendant wishes the right to begin he should be held to admit all that plaintiff has any right to prove under his pleading.

The rule generally accepted for determining the right to open and close is that he upon whom the burden of proof lies, or, as has been said in some cases, he who holds the laboring oar, is entitled to open and close the case, whether he be plaintiff or defendant. *Einstein v. Munnerlyn*, 32 Fla. 381, 13 So. 926; *Fidelity Bkg. & T. Co. v. Kangara Valley Tea Co.* 95 Ga. 172, 22 S. E. 50; *Cassell v. First Nat. Bank*, 169 Ill. 380, 48 N. E. 701; *Leib v. Craddock*, 87 Ky. 525, 9 S. W. 838; *Olds Wagon Co. v. Benedict*, 25 Neb. 372, 41 N. W. 254; *Hickman v. Layne*, 47 Neb. 177, 66 N. W. 298; *Staats v. Hausling*, 22 Misc. 526, 50 N. Y. Supp. 222; *Whitney v. Brownewell*, 71 Iowa, 251, 32 N. W. 285; *Bush v. Wathen*, 20 Ky. L. Rep. 731, 47 S. W. 599.

In *Cortelyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964, Chief Justice Maxwell said: "The rule is this: 'That where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him.' This rule has been generally adopted in this country. The unvarying test furnished by this rule is to consider which party would, in the estate of the pleadings and of the record admissions, get a verdict for substantial damages, if the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for plaintiff to prove at the outset, and the plaintiff begins and replies."

The test is whether without any proof the plaintiff upon the pleadings is entitled to recover upon all the causes of action alleged in his complaint. If he is, and the defendant alleges any counterclaim controverted by the plaintiff's pleading or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action and which is the subject of trial, the defendant has the right to open and close; otherwise not. *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

The test formerly stated, and sometimes repeated even in cases under the new procedure, is that the party against whom judgment would go if no evidence were given has the right to begin. *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305; *Martin v. Suber*, 39 S. C. 525, 18 S. E. 125; *Finnell v. Bohannon*, 19 Ky. L. Rep. 1587, 44 S. W. 94; *Porter v. Still*, 63 Miss. 357.

But this is not a safe guide under the new procedure, for now partial defenses may be pleaded; and if a partial defense is the only defense, plaintiff would be entitled to judgment if no evidence were given, but,

nevertheless, if the partial defense is only a traverse of a part of his complaint or allegations of damage, he is entitled to give evidence, and therefore to open and close, in order that he may recover the full amount claimed.

On a plea of payment of the amount due on a contract, although the letter of the rule would give to the defendant the right to begin and conclude, yet, where his testimony tended to prove that plaintiff maliciously delayed the work and contested the matter as if there had been a plea having the effect of the general issue, the burden is on the plaintiff and entitles him to begin and conclude. *Smaltz v. Ryan*, 112 Pa. 423, 3 Atl. 772.

In a suit brought on a promissory note, when the execution of the note has been denied under oath, the burden of proving its execution rests on plaintiffs, and they are entitled to open and close the argument. *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120.

And a city in an action to recover a penalty for the violation of a municipal ordinance has the right to open and conclude argument before the jury. *Columbia v. Johnson*, 72 Mo. App. 232.

In many of the states statutes have been enacted providing rules for the determination of which party shall open and close the case. Distinctions are made in these statutes between those who may open the argument and those who must open the case to the jury and adduce the first evidence. In California (Code Civ. Proc. § 607), Idaho (Rev. Code, § 4383), Louisiana (Garland's Rev. Code § 485), Montana (Code Civ. Proc. 1895, § 1080), North Dakota (Rev. Codes, § 5431), Oregon (Hill's Anno. Laws, § 196), and Utah (Rev. Stat. § 3147), the plaintiff must open the argument, unless the judge for special reasons otherwise directs, except in Louisiana where the statute leaves no discretion with the trial court.

In the states of Arizona (Rev. Stat. § 763), Arkansas (Sand. & H. Dig. § 5820; *Mansur & T. Implement Co. v. Davis*, 61 Ark. 627, 33 S. W. 1074), Indiana (3 Horner's Rev. Stat. 1896, § 536; *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243); Iowa (Code 1897, § 3701), Kentucky (Bullitt's Codes of Practice, § 317), Texas (Sayles's Civ. Stat. arts. 1297, 1299; *Hittson v. State Nat. Bank* (Tex. 14 S. W. 780), Washington (2 Hill's Anno. Laws, § 354),—the party having the burden of proof has the right to the opening and closing argument.

In the state of Arizona the provision is that he who has the burden of proof on the whole case shall open and close, but if there be several parties having several claims or defenses the court may prescribe the order of argument. Rev. Stat. § 763.

In Minnesota the defendant commences and the plaintiff concludes the argument. Gen. Stat. 1894, § 5371.

In the states of Nebraska and Ohio the party who would be defeated if no evidence were given has the opening and closing of the argument, unless the court for special reasons otherwise directs. Neb. Comp. Laws 1897, § 5855; Bates's (Ohio) Stat. § 5190.

In the states of Arizona (Rev. Stat. § 761), Arkansas, California, Idaho, Kentucky, Louisiana (Garland's Code 1894, § 476), Minnesota (Gen.

Stat. § 5371), Nebraska, North Dakota, Ohio, Oregon, Utah, and Washington, the plaintiff opens the case to the jury unless the court shall otherwise direct, except in Louisiana and Washington, where this last phrase is not found. See sections of the statutes of those states cited *supra*. In the states of Indiana (Horner's Rev. Stat. 1896, § 533), Iowa (Code 1897, § 3700), Kansas (Gen. Stat. 1897, § 285), Montana, Oklahoma, Texas, and Wyoming (Rev. Stat. ¶ 2553), the party who has the burden of proof opens the case, unless the court for special reasons otherwise directs, except in Iowa, where this last phrase is not found. (See sections of those statutes cited *supra*.)

In the states of Arkansas, California, Idaho, Kentucky, Louisiana, Minnesota, North Dakota, Oregon, and Utah, the plaintiff produces his evidence first, unless the court otherwise directs, except in Louisiana where the court has no discretion. See sections of these statutes cited *supra*.

In the states of Arizona, Indiana (Horner's Rev. Stat. 1896, § 533), Iowa (Code 1897, § 3700), Kansas (Gen. Stat. 1897, § 285), Montana, Oklahoma (Stat. ¶ 4165), Texas, Washington, and Wyoming the party who has the burden of proof must produce his evidence first.

In the states of Nebraska and Ohio the party who would be defeated if no evidence were given must produce his evidence first, unless the court for special reasons otherwise directs.

In Iowa (Code 1897, § 3700), Louisiana (Garland's Code, § 476), and Washington (2 Hill's Anno. Laws, § 354), the phrase "unless the court otherwise directs" is not part of the statutory provision.

The simple rule stated in the text will readily solve all controversies as to the right to begin, due attention being given to the following considerations:

2. Application of the rule.

The rule stated in the preceding section applies even where plaintiff has only to prove damages,¹ whether general² or special.

¹*St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083; *Johnson v. Josephs*, 75 Me. 544; *Elder v. Oliver*, 30 Mo. App. 575; *Cortelyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964; *Fry v. Bennett*, 28 N. Y. 324, Affirming 3 Bosw. 200; *Littlejohn v. Greeley*, 13 Abb. Pr. 41, 45; *Huntington v. Conkey*, 33 Barb. 218; *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739. And he is also entitled to open and close if he has but to prove the amount of attorneys' fees to which he is entitled.

²*Opdyke v. Weed*, 18 Abb. Pr. 223, note; *Hecker v. Hopkins*, 16 Abb. Pr. 301, note; *Stames v. Schofield* (Ind. App.) 31 N. E. 480; *Boyd v. Smith* (Ind. App.) 39 N. E. 208. But it is suggested in *Cheesman v. Hart*, 42 Fed. Rep. 98, that if the defendant holds the laboring oar on all vital issues in question it is not error to allow him to open and close, although the plaintiff had to prove the value of ore which the defendant had taken.

Under the new procedure matter of aggravation of damages may be pleaded, for every fact of which evidence may be given at the trial is material and may be pleaded. *Millington v. Loring*, 29 Week. Rep. 207. See also *Stetson v. Croskey*, 52 Pa. 230.

But the mere computation of interest is not matter of evidence within the rule. *Huntington v. Conkey*, 33 Barb. 218; *Brennan v. Security L. Ins. & Annuity Co.* 4 Daly, 296; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

The reason is that it is a deduction of law, and not a question of fact; but the facts on which the right to interest depend are matter for evidence.

3. — several issues.

If defendant's pleading raises several issues, plaintiff is entitled to the right to begin if he has any proof to give under any of them.¹

¹*Porter v. Still*, 63 Miss. 357; *Stillwell v. Archer*, 64 Hun, 169, 18 N. Y. Supp. 888; *Trenkmann v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232; *Montgomery v. Swindler*, 32 Ohio St. 224, 226; *Slauson v. Englehart*, 34 Barb. 198. The rule was the same at common law. *Jackson v. Pittsford*, 8 Blackf. 194; *Bowen v. Spears*, 20 Ind. 146, 147; *Buzzell v. Snell*, 25 N. H. 474; *Lexington, F. L. & M. Ins. Co. v. Paver*, 16 Ohio, 324.

But the right of the court in such case to sever the issues, and give the opening and closing to each party accordingly, was recognized in *Wisconsin Central Bank v. St. John*, 17 Wis. 157, and *Vuyton v. Brenell*, 1 Wash. C. C. 467.

4. — several defendants.

Where there are several defendants the court may properly require the plaintiff to begin, if he has a right to begin as against any defendant.¹

¹*Boykin v. Epstein*, 94 Ga. 750, 22 S. E. 218; *Dodd v. Norman*, 99 Ga. 319, 25 S. E. 650; *Sodousky v. McGee*, 4 J. J. Marsh, 267 (a well-considered case); *Munn v. Martin* (Tex. App.) 15 S. W. 195. And see *Katz v. Kuhn*, 9 Daly, 166, justly qualified by Mr. Moak in 32 Moak Eng. Rep. 276, note. And see *Kirkpatrick v. Armstrong*, 79 Ind. 384. In *Lone Star Leather Co. v. City Nat. Bank*, 12 Tex. Civ. App. 128, 34 S. W. 297, the opening and closing was given to one defendant against a co-defendant.

5. Defendant's right by virtue of admission in pleading.

Defendant's pleading does not entitle him to begin, unless, when taken as a whole, it unqualifiedly admits every material allegation of plaintiff's pleading.¹

¹*Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *Razor v. Razor*, 42 Ill. App. 504; *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; *Milwaukee Harvesting Co. v. Crabtree*, 101 Iowa, 526, 70 N. W. 704; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Redmond v. Tone*, 32 N. Y. S. R. 260, 10 N. Y. Supp. 506; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Tallmadge v. Press Pub. Co.*

39 N. Y. S. R. 29, 14 N. Y. Supp. 331; *Plenty v. Rendle*, 43 Hun, 568; *Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94; *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947; *Beckham v. Southern R. Co.* 50 S. C. 25, 27 S. E. 611.

The plaintiff's case must be admitted in its entirety, for otherwise the *onus* is left upon him. *Filby v. Turner*, 9 Colo. App. 202, 47 Pac. 1037. If the defendant denies even one of the important allegations of the plaintiff's claim, he is not entitled to open and conclude the argument, although he admits the remainder of the allegations of the complaint. *Steed v. Petty*, 65 Tex. 490; *Benedict v. Penfield*, 42 Hun, 176.

Thus in an action for goods sold, an admission of the purchase, coupled with an allegation that defendant agreed to pay, not in money but in merchandise, is, though in form new matter, in effect only a denial of the contract as alleged. *Bradley v. Clark*, 1 Cush. 293; *Gilland v. Lawrence*, 13 N. Y. Week. Dig. 372.

So in an action for price of services or goods an allegation of negligence or deficiency in quality, stated as a ground for recoupment, does not admit the cause of action. *Fiedelvey v. Reis*, 12 Ohio L. J. 77, citing *Simmons v. Green*, 35 Ohio St. 104; *Graham v. Gautier*, 21 Tex. 111 (an action for damages for malpractice). This question is still contested. *Penhryn Slate Co. v. Meyer*, 8 Daly, 61; *Howard v. Hayes*, 15 Jones & S. 89. But compare *Stronach v. Bledsoe*, 85 N. C. 473. For other illustrations see *Cheesman v. Hart*, 42 Fed. Rep. 98; *Steel v. Stames* (Ark.) 15 S. W. 17; *Thompson v. Mills*, 39 Ind. 528; *Donahoe v. Rich*, 2 Ind. App. 540, 28 N. E. 1001; *Goodpaster v. Voris*, 8 Iowa, 334, 74 Am. Dec. 313; *Vance v. Vance*, 2 Met. 581; *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384; *Lindsley v. European Petroleum Co.* 10 Abb. Pr. N. S. 107, 41 How. Pr. 56; *Felts v. Clapper*, 69 Hun, 373, 23 N. Y. Supp. 508; *Trenkmann v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232; *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530; *Edwards v. Murray* (Wyo.) 38 Pac. 681.

Whether an allegation which is in form new matter, but is in fact inconsistent with a material allegation of the complaint, is to be deemed a denial under the new procedure, is a question on which there is much difference of opinion. Compare with above cases 8 Abb. N. Y. Dig. (new ed. vol. 2 of Supp.) 509, §§ 184, 185.

The better view is that for the purpose of determining the right to begin, the admission of plaintiff's case, which defendant relies on, must be explicit and not obscure; and that if his answer gives an inconsistent version merely, without an express denial, he may be required to make an express admission of plaintiff's version as a condition of claiming the right to begin. Argumentative denials, and affirmative statements which imply a denial, have generally been held to leave the right to begin with plaintiff. *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Haines v. Kent*, 11 Ind. 126; *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660; *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425; *Denny v. Booker*, 2 Bibb. 427; *Thurston v. Kennett*, 22 N. H. 151; *Churchill v. Lee*, 77 N. C. 341; *Beatty v. Hatcher*, 13 Ohio St. 115. But compare *Patton v. Hamilton*, 12 Ind. 256; *Aurora v. Cobb*, 21 Ind. 492; *Hoxie v. Grecne*, 37 How. Pr. 97; *DeGraff v. Carmichael*, 13 Hun, 129.

Defendant has the right to open and close in suits for the recovery of money due under a contract to pay, such as a note, bond, or other instrument, on his admissions of the execution of the instrument and its delivery, coupled with averments of failure of consideration, duress, that it was given by mistake. *Graboski v. Gewerz*, 44 N. Y. S. R. 127, 17 N. Y. Supp. 528; *Brown v. Tausick*, 1 Misc. 16, 20 N. Y. Supp. 369; *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305; *Martin v. Suber*, 39 S. C. 535, 18 S. E. 125; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59; *Levins v. Smith*, 102 Ga. 480, 31 S. E. 104; *Southern Mut. Bldg. & L. Asso. v. Perry*, 103 Ga. 800, 30 S. E. 658, or setting up other affirmative defenses, such as usury (*Seekel v. Norman*, 78 Iowa, 254, 43 N. W. 190; *Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205), payment or set-off (*Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532), or counterclaim for damages (*Brower v. Nellis*, 16 Ind. App. 183, 44 N. E. 939; *Fitch v. Parker*, 20 Ky. L. Rep. 842, 47 S. W. 627; *Grant Quarry Co. v. Lyons Constr. Co.* 72 Mo. App. 530; *Harley v. Fitzgerald*, 84 Hun, 305, 32 N. Y. Supp. 414; *Parks v. Young*, 75 Tex. 278, 12 S. W. 986).

In a suit on a life insurance policy when the answer admits the execution of the policy, death of the party whose life was insured, proof of loss, etc., but pleads in defense a violation of the condition, the defendant has the right to open and close. *Beller v. Supreme Lodge, K. of P.* 66 Mo. App. 449. Likewise in an action on a policy of fire insurance, where the loss is admitted and the sole question is upon the claim of defendant that the fire was caused in a certain manner, the defendant bears the burden of proving that cause and takes with it the right to open and close. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 833, 11 S. W. 14.

The same rule prevails in a suit on a judgment, the validity of which is unquestioned, when payment is the defense. *Lofland v. McDaniel* (Del.) 41 Atl. 882; *Pinson v. Puckett*, 35 S. C. 178, 14 S. E. 393.

And, under a statute providing that the party who would be defeated if no evidence were given must first produce his evidence and argue the case to the jury, when the answer makes no denial of the allegations of the complaint that advancements by plaintiff of specific sums had been made for the benefit and at the request of defendant, but averred that they were made to a third party and that the defendant was insane, the defendant will be entitled to open and close. *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555; Neb. Code Civ. Proc. § 283.

In trespass to try title, when the defendant admits the plaintiff's right to recover unless that right is defeated by reason of a defective acknowledgment to plaintiff's deed, the defendant has the right to open and close, where the plaintiffs had a deed which appeared to be duly acknowledged and this made a prima facie case for them. *Atkinson v. Reed* (Tex. Civ. App.) 49 S. W. 260.

Defendant also has this right in an action to recover for libel or slander, if he admits the act complained of, but pleads that it was justified. *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Hall v. Elgin Dairy Co.* 15 Wash. 542, 46 Pac. 1049. Or if the answer is in mitigation merely. *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188. Or if

defendant also deny that the publication was malicious or that the words were slanderous when it is unnecessary to prove malice because the words published were of themselves actionable, he bears the burden of proving his plea of justification and has the right to open and conclude. *Louisville Courier Journal Co. v. Weaver*, 13 Ky. L. Rep. 599, 17 S. W. 1018. But see § 2, and cases cited, where it is said that plaintiff shall open and close if he has damages to prove, and, in the same connection, *Burckhalter v. Coward*, 16 S. C. 435, where the court says the rule seems to be settled in the English courts that although the defendant admits the cause of action and justifies, in actions for personal injuries, libel, and slander, the plaintiff shall open and close if he must prove unliquidated damages.

A like rule obtains in suits to recover for an assault and battery. The plea justifying entitles the defendant to open and close. *Phillips v. Mann*, 19 Ky. L. Rep. 1705, 44 S. W. 379; *Strickland v. Atlanta & W. P. R. Co.* 99 Ga. 124, 24 S. E. 981; *Seymour v. Bailey*, 76 Ga. 338.

A plea of justification in a suit to recover for malicious prosecution and arrest entitles the defendant to open and conclude. *Henderson v. Francis*, 75 Ga. 178; *Ocean S. S. Co. v. Williams*, 69 Ga. 251; *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857; *Johnson v. Bradstreet Co.* 81 Ga. 425, 7 S. E. 867. But see *Horn v. Simms*, 92 Ga. 421, 17 S. E. 670, where it was held that the plea was insufficient in justification and that defendant did not have the right to open and conclude. The same rule obtains in suits for damages for personal injuries when the defendant pleads negligence on the part of the plaintiff contributing to his injury. *Bush v. Wathen*, 20 Ky. L. Rep. 731, 47 S. W. 599.

As to what is a plea of justification, see *Ocean S. S. Co. v. Williams*, 69 Ga. 251; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Georgia R. Co. v. Williams*, 74 Ga. 723; *Henderson v. Francis*, 75 Ga. 178; *Seymour v. Bailey*, 76 Ga. 338.

6. Admission offered at the trial.

Defendant has the right to begin, if by leave of court he withdraws or strikes out all denial from his pleading,¹ or if he makes an unqualified,² oral,³ or written admission,⁴ conceding all⁵ that the plaintiff would need to prove to entitle him to recover the amount claimed. In New York the answer must be amended.⁶ Attorney or counsel has implied authority to make such admission.⁷ But it is not enough to admit⁸ that plaintiff has a prima facie case, supposing that defendant should fail to establish his affirmative defense. The admission must be of the facts.⁹

¹*Jackson v. Delaplaine*, 6 Houst. 358; *Harvey v. Ellithorpe*, 26 Ill. 418; *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

²An admission coupled with a contingency is not enough. *Camp v. Brown*, 48 Ind. 575. In this case the action was on a note including reasonable attorney's fee, and an admission that a specified sum would be reasonable, if plaintiff should be found entitled to recover the whole amount

of the note, was held insufficient to entitle defendant to begin. See also *Smith v. Wellborn*, 75 Ga. 799.

*To the contrary was *Johnson v. Wideman*, Dud. L. 325, where it was held that the admission must be of record, before trial. To the same effect was *Gray v. Cottrell*, 1 Hill, L. 38; *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 33 S. W. 259.

**Campbell v. Roberts*, 66 Ga. 733; *Aurora v. Cobb*, 21 Ind. 492, 509; *Katz v. Kuhn*, 9 Daly, 166; *Clements v. McCain* (Tex. Civ. App.) 49 S. W. 122.

**Bertrand v. Taylor*, 32 Ark. 470, 476; *Burroughs v. Hunt*, 13 Ind. 178, 180; *Clarkson v. Meyer*, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663. But the right is denied him if he does not admit all. *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130.

**Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

See *Oliver v. Bennett*, 65 N. Y. 559; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539. And compare p. 41 of this brief, subd. 34, note 2, with *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550.

**Wigglesworth v. Atkins*, 5 Cush. 212. The rule of court referred to in this last case is to be found in 8 Cush. 603, note.

*It is not enough that plaintiff has obtained an auditor's report in his favor, for he may or may not use it. *Snow v. Batchelder*, 8 Cush. 513. Nor, if he does use it, does it change the right to begin if its conclusion is impugned by defendant. *Chesley v. Chesley*, 37 N. H. 229. It is said in *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564, that if plaintiff has been compelled to keep his witnesses in attendance till after commencing to swear the jury, it is unreasonable to deprive him of the privilege of opening.

In an attachment of real property, when upon the announcement ready for trial, the defendant admits the plaintiff's cause of action in full and only denies that the property levied upon was subject to forced sale, claiming it as his homestead, although the complaint alleges that the defendant was about to transfer his property to defraud his creditors, the defendant need not also admit these allegations in order to be entitled to open and conclude. *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28. For other instances, see *Dodd v. Norman*, 99 Ga. 319, 25 S. E. 650; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Munn v. Martin* (Tex. App.) 15 S. W. 195.

The plaintiff has the right to reply although the defendant did not call any witness, when the defendant put in evidence certain documents during the cross-examination of plaintiff's witness. *Quintal v. Chalmers*, 12 Manitoba, 231.

Although no issue is raised on a denial, the defendant will not be given the opening and closing unless the denial is disclaimed (*Boehm v. Lies*, 46 N. Y. S. R. 26, 18 N. Y. Supp. 577), nor will he be given the right

when the plaintiff has the burden, although he has the burden on certain issues (*Rials v. Powell*, 83 Ga. 278, 9 S. E. 613).

There seems to be some little difference in opinion between the courts of various states concerning the time at which the admissions must be made in order that the defendant may be entitled to open and conclude the argument.

In Georgia the court has declared that it is necessary for the admission to be made before the plaintiff offers any evidence, and an admission after the plaintiff has made out a prima facie case comes too late. *Cool v. Coffey*, 103 Ga. 384, 30 S. E. 27; *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 543; *Messingale v. Pounds*, 100 Ga. 770, 28 S. E. 510.

In Indiana the admission must be made by the pleadings before the trial commences. *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056.

In some of the states, however, it is said that the court may permit the defendant to open and close whenever during the trial he assumes the affirmative. *Goetz v. Sona*, 65 Ill. App. 78; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307, Affirming 69 Ill. App. 422.

A party who has admitted a fact on the trial and thereby obtained the right to open and close may not thereafter controvert the fact admitted. *Smith v. Wellborn*, 75 Ga. 799.

In Iowa, the admission made after the opening argument and for the purpose of obtaining the right to close came too late. *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959. And in *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453, it was held that an admission after the introduction of any evidence was too late; but in *Names v. Dwelling House Ins. Co.* 95 Iowa, 642, 64 N. W. 628, defendant was permitted to open and close the argument by admitting plaintiff's case at the conclusion of the evidence.

7. Unessential allegation.

An allegation not essential to the party's recovery of the amount claimed need not be admitted by the other in order to entitle the latter to the right to begin.¹ The fact that a party has alleged what he has not the burden of proving in order to recover does not entitle him to begin.²

¹*Bush v. Wathen*, 20 Ky. L. Rep. 731, 47 S. W. 599; *Steele v. Hinshaw*, 14 Ind. App. 384, 42 N. E. 1034.

Thus where plaintiffs sued for goods sold by them jointly, their allegation that they were partners, though it is relevant, and, it may be, material, in case plaintiff has to give evidence, is not essential to enable them to recover the amount claimed; and hence, an admission of the sale, though coupled with a denial of the partnership, is a sufficient admission within the rule. *Millard v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371. See also *Hurliman v. Seckendorf*, 9 Misc. 264, 29 N. Y. Supp. 740; *Trenkman v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232.

So, a demand in the answer for the production of an instrument, a copy of which is annexed to the complaint, coupled with an admission of the

genuineness of the original, does not change the rule. *Murray v. New York L. Ins. Co.* 85 N. Y. 236, 9 Abb. N. C. 309, Reversing 19 Hun, 350. Nor does defendant's denial of an allegation not essential to recovery, but relevant only as anticipating and avoiding an expected defense. *List v. Kortepeter*, 26 Ind. 27.

But compare *Fry v. Bennett*, 28 N. Y. 324, Affirming 3 Bosw. 200, where it was held that an allegation of malice in the publication of an article apparently privileged was one which plaintiff had a right to prove, and had therefore a right to begin for the purpose of proving.

¹*Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371.

Clafin v. Baere, 28 Hun, 204, where the allegation was defendant's allegation, in form as a separate defense, that the goods were sold on a credit which had not expired, for this was in legal effect only a denial of part of plaintiff's case.

3. Plaintiff's right by admitting defendant's case.

Where defendant would be entitled to begin under the foregoing rules, yet nevertheless if the plaintiff, by a reply admitting and avoiding defendant's allegation of new matter, or by an unqualified oral admission at the trial, concedes all that defendant would have to prove in order to entitle himself to a verdict, or to a reduction of plaintiff's recovery to the full extent which defendant has claimed, then plaintiff has the right to begin.¹

¹*Mann v. Scott*, 32 Ark. 593, 596; *Judah v. Vincennes University*, 23 Ind. 272; *Bowen v. Spears*, 20 Ind. 146; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 83; *Love v. Dickerson*, 85 N. C. 5; *Richards v. Nixon*, 20 Pa. 19; *Brown v. Kirkpatrick*, 5 S. C. 267.

But the plaintiff may not change after the evidence is in when the defendant has had the initiative until that time. *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598.

9. Refusal of the right, error.

An exception lies to the refusal of the right to begin.¹

¹*Tobin v. Jenkins*, 29 Ark. 151; *James v. Kiser*, 65 Ga. 515; *Chapman v. Atlanta & W. P. R. Co.* 74 Ga. 547; *Phelps v. Thurman*, 74 Ga. 837; *Colwell v. Brower*, 75 Ill. 516; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126, 134; *Shank v. Fleming*, 9 Ind. 189; *Judah v. Vincennes University*, 23 Ind. 272, 284; *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056; *Denny v. Booker*, 2 Bibb, 427; *Wright v. Northwestern Mut. L. Ins. Co.* 91 Ky. 208, 15 S. W. 242; *Royal Ins. Co. v. Schwing*, 10 Ky. L. Rep. 380, 9 S. W. 242; *Crabtree v. Atchison*, 13 Ky. L. Rep. 321; *Johnson v. Josephs*, 75 Me. 544; *Porter v. Still*, 63 Miss. 357; *Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371; *Oppen v. Caillon*, 9 N. Y. Week. Dig. 39, 9 Daly, 157; *Murray v. New York L. Ins. Co.* 9 Abb. N. C. 309, 85 N. Y. 236, Reversing 19 Hun, 350; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Parish v. Sun Printing & Pub. Asso.* 6 App. Div. 585, 39 N. Y. Supp. 540;

Hudson v. Wetherington, 79 N. C. 3; *Stronach v. Bledsoe*, 85 N. C. 473; *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259; *Hillboldt v. Waugh* (Tex. Civ. App.) 47 F. W. 829. And see 22 Moak, Eng. Rep. 739. *Contra*, *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Hall v. Wear*, 92 U. S. 728, 23 L. ed. 500; *Goodpaster v. Voris*, 8 Iowa, 334, 74 Am. Dec. 313.

It is not essential to the maintenance of error in a ruling as to the right to open and conclude that the party denied the privilege by a ruling after the jury was sworn should offer to introduce his witness or open and conclude the case. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 883, 11 S. W. 14.

However, a judgment may not be reversed for the mere granting of the privilege to open and close, when it does not appear from the record that the privilege was exercised, and it will not be assumed, for the purpose of impugning the judgment, that the party awarded the right opened and concluded the argument. *Railway Co. v. Orenbaum* (Tex. App.) 16 S. W. 936.

While it is undoubtedly the rule in most jurisdictions that an error in awarding the right to open and close will work a reversal of the case if complained of upon appeal, nevertheless in some jurisdictions such is not the rule. And when the order of trial is fixed by statute with the proviso that such shall be the order unless the court for special reasons otherwise directs (See statutes cited under § 1, *supra*), it has been held that the right to open and close rests in the sound judicial discretion of the trial court. *Aultman v. Falkum*, 47 Minn. 414, 50 N. W. 471.

Judge Thompson, although admitting that the rule in Missouri is contrary to that in most jurisdictions, maintains that the right to open and close rests in the sound discretion of the court and that an error committed in that regard will not be sufficient to reverse a cause unless it is plainly made to appear that injury has resulted therefrom. *Elder v. Oliver*, 30 Mo. App. 575. To the same effect, see *Watkins v. Atwell* (Tex. Civ. App.) 45 S. W. 404; *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

And in other jurisdictions also it is said that an erroneous permission to open and close will not be ground for reversal unless it plainly appears that injury resulted. *Moore v. Brown*, 81 Ga. 10, 6 S. E. 833; *Seiler v. Economic L. Asso.* 105 Iowa, 87, 43 L. R. A. 537, 74 N. W. 941; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314.

In other cases it is maintained that a judgment will not be reversed because of error in awarding the right to open and close, unless it is shown that the court abused its discretion. *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *Goetz v. Sona*, 65 Ill. App. 78; *Perry v. Archard* (Ind. Terr. App.) 42 S. W. 421; *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959; *White v. Adams*, 77 Iowa, 295, 42 N. W. 199; *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139; *Meredith v. Wilkinson*, 31 Mo. App. 1; *Henry Gaus & Sons Mfg. Co. v. Magee, L. & La. B. Mfg. Co.* 42 Mo. App. 307; *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253.

In yet other jurisdictions the award of the opening and closing is looked

upon merely as a matter of practice and is not reviewable on appeal. *Twaddell v. Chester City Traction Co.* 6 Del. Co. Rep. 399; *Overby v. Gordon*, 13 App. D. C. 392; *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328; *Blume v. Hartman*, 115 Pa. 32, 8 Atl. 219.

Error of refusal is not cured by allowing the claimant the closing address. *Penhryn Slate Co. v. Meyer*, 8 Daly, 61. But the erroneous ruling may be corrected when discovered after all the evidence has been introduced, and the party having the burden of proof be allowed the opening and conclusion of the argument. *McCalla v. American Freehold Land Mortg. Co.* 90 Ga. 113, 15 S. E. 687.

10. Duty to begin.

The party who has the right to begin may be required to do so; and, if he refuse, the other party may rest on the admission which gave the right to begin, and take a verdict accordingly.¹

¹*Osborne v. Kline*, 18 Neb. 344, 25 N. W. 360.

11. Waiver of the opening and closing.

The right to open and close may be waived by the party entitled to it, and such waiver will be implied from conduct inconsistent with the assertion of the right.¹

¹The party entitled to open and close has been held to have waived the right by acquiescing in a ruling of the court permitting the other party to open and conclude. *Frey v. Mathias*, 18 Ky. L. Rep. 913, 38 S. W. 871; *Sherman v. Hale*, 76 Iowa, 383, 41 N. W. 48. Or by not claiming the affirmative at the proper time. *Crawford v. Tyng*, 7 Misc. 239, 27 N. Y. Supp. 424. Or by permitting the other party without objection to assume the right in the absence of a ruling by the court. *Burgess v. Burgess*, 44 Neb. 16, 62 N. W. 242; *Dallas & G. R. Co. v. Chenault* (Tex. App.) 16 S. W. 173.

What amounts to a waiver of right. See *Goodwin v. Hirsh*, 5 Jones & S. 503; *Merrill v. Calcagnino*, 8 N. Y. Week. Dig. 487; *De Graff v. Carmichael*, 13 Hun, 129; *Ransone v. Christian*, 56 Ga. 351; *Wheatley v. Phelps*, 3 Dana, 302; *Bowen v. Spears*, 20 Ind. 146.

An exception to a ruling awarding the right to open and close will not be deemed to have been waived by the party denied the right asking an instruction that the burden of proof is on the other party. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 883, 11 S. W. 14.

V.—THE OPENING.

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| 1. Limits of the opening. | 5. — exception. |
| 2. — Rehearsing evidence. | 6. Reading the pleadings. |
| 3. — irrelevant and impertinent matters. | 7. Motion to dismiss, or for verdict, on the opening. |
| 4. — stating the law. | 8. Defendant's opening. |

1. Limits of the opening.

The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts, and the substance of the evidence counsel is about to introduce.¹

Plaintiff's counsel in opening may also state the nature of the defense, if it appears upon the record,² and the manner in which he proposes to disprove it.³

¹*Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593.

Facts in the history of the case showing how it came to be before the jury for trial may be referred to; as, a statement that the case was brought from another county on a change of venue, without stating the ground of the change. *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. And while it is not proper to state the course and result of a former trial, a mere statement that an appeal from a former trial was taken by defendant will not demand a reversal. *Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775. See also *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253.

If a matter stated be pertinent to an issue, the court cannot exclude it; nor can its action be questioned because counsel subsequently fail to support the statement by offer of proof. So held as to a reference to a defense subsequently abandoned. *Hall v. Needles* (Ind. Ter.) 38 S. W. 671.

²*Ayrault v. Chamberlain*, 33 Barb. 229.

The English practice of anticipating the defense does not prevail with us. Our rule does not require, and should not allow, an opening in respect to the defense, except in an incidental way by a brief statement of its general character. *Ayrault v. Chamberlain*, *supra*. See also *Elwell v. Chamberlin*, 31 N. Y. 611, 614, citing with approval the *Ayrault-Cham-*

berlain Case; *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099. And see *Baker v. State*, 69 Wis. 32, 33 N. W. 52, excluding statement in opening by prosecution in bastardy case, that defendant would introduce testimony touching the character of prosecutrix, and as to what he tried to prove on a former trial.

*1 Burrill, Pr. 234.

2. — rehearsing evidence.

Counsel has not a right to state intended evidence in detail,¹ nor to read documents he proposes to offer, so as to get matter before the jury without opportunity for the court to decide on its admissibility.² But he may state the material facts he relies on,³ and in so doing may refer to documents to refresh his memory; or use a map or diagram to explain those facts.⁴

¹*Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373.

²*Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *McFadden v. Morning Journal Asso.* 28 App. Div. 508, 51 N. Y. Supp. 275.

³*Giffen v. Lewiston* (Idaho) 55 Pac. 545; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593. As, the earning capacity of plaintiff before and since the injury for which damages are sought. *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148.

The opening in fact amounting to little more than an offer to prove certain facts; and he is not restricted to a statement of such facts as would be admissible under the strict rules governing the admission of testimony. *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652 (refusing to reverse because counsel stated facts not competent to be proved).

⁴*Battishill v. Humphreys*, 64 Mich. 494, 31 N. W. 894 (reversing judgment for error in refusing to allow counsel for defendant to so use a diagram). But *Hill v. Watkins Water & Sewer Comrs.* 77 Hun, 491, 28 N. Y. Supp. 805, holds it discretionary with the court to allow counsel to so use a map not then proved or put in evidence.

3. — irrelevant and impertinent matters.

Counsel has not a right to state matters outside of the issues, or matters calculated to prejudice the jury or arouse their sympathy.¹

¹*Hennies v. Vogel*, 87 Ill. 242; *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148.

But only bad faith or a gross misconception of what is admissible, resulting in bringing to the attention of the jury matters wholly irrelevant, or of a nature calculated to create so profound an impression that the charge of the court cannot remove the prejudice created, will warrant reversal on the ground that counsel has violated this rule. *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153. So, reversal is not imperative where he was not explicitly cautioned not to refer to the matter, and the

court instructed the jury to disregard his remarks. *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634. Or the reference was indefinite, and the evidence thereunder was distinctly pronounced by the court to be incompetent and not germane to the issues. *Belle of Nelson Distilling Co. v. Riggs* (Ky.) 45 S. W. 99. And especially where the improper statement was withdrawn immediately after an exception, with an acknowledgment that it was not justified under the existing state of the record, though the acknowledgment did not state that words withdrawn were untrue. *Erb v. German-American Ins. Co.* 98 Iowa, 606, 40 L. R. A. 845, 67 N. W. 583.

4. — stating the law.

Though counsel has not a right to read law to the jury or to usurp the province of the court in any way, in this respect,¹ he has the undoubted right to state in good faith so much of the law, as he claims it to be, in so far as it is necessary to give the jury an understanding of his theory of the case, or to enable him to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony on his case.²

¹*Giffen v. Lewiston* (Idaho) 55 Pac. 545.

²*Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Prentis v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

5. — exception.

An exception lies to allowing counsel to go beyond the above limits in opening.¹

¹Such exceptions should be sustained if a verdict is obtained apparently in consequence of the error. *Scripps v. Reilly*, 38 Mich. 10; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174; *Rickabus v. Gott*, 51 Mich. 227; 16 N. W. 384; *Bendetson v. Moody*, 100 Mich. 553, 59 N. W. 252. And see *Ayrault v. Chamberlain*, 33 Barb. 229.

Otherwise, however, where the error worked no injury. *Phenix Ins. Co. v. Weeks*, 45 Kan. 751, 26 Pac. 410; *Brusie v. Peck Bros. & Co.* 42 N. Y. S. R. 801, 16 N. Y. Supp. 645. Or was waived or cured by action of the parties or court. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Welch v. Palmer*, 85 Mich. 310, 48 N. W. 552; *Felch v. Weare*, 66 N. H. 582, 27 Atl. 226; *McFadden v. Morning Journal Asso.* 28 App. Div. 508, 51 N. Y. Supp. 275; *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634; *Ruege v. Gates*, 71 Wis. 634, 38 N. W. 181. Or where no evidence was offered to sustain the statement. *Baumier v. Artiau*, 79 Mich. 509, 44 N. W. 939. Or there was no ruling by the trial court upon the question. *Chicago Trust & Sav. Bank v. Landfield*, 73 Ill. App. 173.

And a judgment should not be reversed because counsel misstated the nature of the cause of action charged, in the absence of apparent prejudice to defendant thereby. *Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497. Nor

because he relied on defendant's liability under a theory not afterward conclusively established, where the liability is conclusively established on another theory equally within the declaration. "It would be technical and unjust to reverse the judgment, and put the plaintiffs to the expense of a new trial, for no other reason than that counsel did not state their case as broadly as they might." *Clark v. O'Rourke*, 111 Mich. 108, 69 N. W. 147.

6. Reading the pleadings.

It is not error to allow counsel, in opening, to read the pleadings of the adverse party as far as to show what is the issue to be tried.¹ Subject to this rule, it is a matter of discretion with the judge whether he will allow the pleadings to be read to the jury,² except so far as they have first been put in evidence. If they contain irrelevant allegations raising issues improper for the jury's consideration it is proper to prohibit them from being read,³ unless put in evidence.

¹*Tinsdale v. Delaware & H. Canal Co.* 116 N. Y. 416, 22 N. E. 700.

This case does not necessarily imply that on the trial of an issue as to one cause of action, admissions contained in a defense in the answer relating only to a separate cause of action could be thus used until formally received in evidence.

²It is within the discretion of the court to permit counsel to read them to the jury, or not, as he pleases. *Hackman v. Maguire*, 20 Mo. App. 286. And because they were not so read is no reason for excluding testimony offered to prove allegations contained in them. *Allen v. Hagan* (Tex. App.) 16 S. W. 176.

³The reason is that the pleadings are for the court; the counsel may be required to read them or state their substance, if necessary, to enable the court to understand the issues raised or the materiality of evidence offered; but the facts stated in them, except so far as admitted, cannot be considered by the jury until put in evidence. *Willis v. Forrest*, 2 Duer, 310. *S. P. Drew v. Andrews*, 8 Hun, 23. Compare *Garfield v. Knight's Ferry & Table Mountain Water Co.* 14 Cal. 35. The right to read the adverse party's pleading in evidence against him is another matter. See Division XIII.

7. Motion to dismiss, or for verdict, on the opening.

If counsel's opening discloses a fatal objection to his action or defense, or if he expressly puts his case solely on a ground untenable in point of law, the court may refuse to hear evidence in support of it, and dismiss the complaint or direct a verdict.¹ To justify granting such a motion the admission must be one which is necessarily fatal to the case.² It is not good practice to grant such a motion unless the opening has been taken down by the stenographer, or the statements relied on are noted in writing.

¹Familiar practice, and sustained more or less expressly in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Ward v. Jewett*, 4 Robt. 714; *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128; *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 621.

The reason is, that the court ought not to spend time in hearing evidence of facts that will not sustain an action. *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128. If the court is one in which a nonsuit cannot be ordered without plaintiff's consent, a verdict may be directed. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

But it is held not good practice in *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 88. Unless on a clear opening statement, it is plainly evident therefrom that no case can be made out. *Emmerson v. Weeks*, 58 Cal. 382. And is not allowed in Wisconsin. *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804; *Haley v. Western Transit Co.* 76 Wis. 344, 45 N. W. 16.

²*Stewart v. Hamilton*, 3 Robt. 672, 18 Abb. Pr. 298, 28 How. Pr. 265; *Wilson v. Press Pub. Co.* 14 Misc. 514, 36 N. Y. Supp. 12; *Emmerson v. Weeks*, 58 Cal. 382; *Noble v. Frack*, 5 Kan. App. 786, 48 Pac. 1004; *Lindley v. Atchison, T. & S. F. R. Co.* 47 Kan. 432, 28 Pac. 201. Mere incompleteness of the statement not being enough when the incompleteness is supplied by the allegations of a good pleading. *Noble v. Frack*, *supra*. And, upon conflict of opinion between court and counsel as to what was in fact stated, counsel assures the court that his statement corresponded with the allegations of his pleading, under which the proffered evidence is clearly admissible. *Butler v. National Home for Disabled Volunteer Soldiers*, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581.

On motion to dismiss on the opening, all the facts alleged in the complaint, and those referred to in the opening as expected to be proved, are to be considered, in the absence of specific objection that they are not admissible under the pleadings. *Clews v. Bank of New York Nat. Bkg. Asso.* 105 N. Y. 398, 42 Am. Rep. 303, 11 N. E. 814; *Roblee v. Indian Lake*, 11 App. Div. 435, 42 N. Y. Supp. 326. And this even though the facts stated in the opening are not stated in the complaint. *Scott v. New York*, 27 App. Div. 240, 50 N. Y. Supp. 191. And *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593, holds that on appeal from a dismissal on plaintiff's opening, on the ground of insufficiency, plaintiff's opening, if it does not appear in the appeal book, will be presumed to comprise the substance of the complaint; and any offer to prove, made in connection with the opening, unless objected to as inadmissible under the pleadings will be regarded as part thereof. But *Steele v. Wells*, 49 N. Y. S. R. 646, 20 N. Y. Supp. 736, holds that dismissal on such motion after plaintiff's opening should not be on the merits.

Omitting facts in the opening essential to plaintiff's case, as well as defects in proof on resting, are immaterial if supplied by proof subsequently adduced by either party. *Fulton v. Metropolitan L. Ins. Co.* 4 Misc. 76, 23 N. Y. Supp. 598.

8. Defendant's opening.

Generally, both at common law and under the codes, counsel for

defendant does not open his defense until plaintiff's evidence has been heard and plaintiff has rested.¹

¹This is the usual practice. But in Illinois it is generally the practice to require defendant to open immediately after plaintiff has opened; and whether defendant may reserve his opening until plaintiff has rested his case, or follow the usual practice of that state, is discretionary with the trial judge. *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282.

ABB.—8.

VI.—ORDER OF PROOF.

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| 1. Discretion of the court. | 7. Exhausting witnesses and subjects. |
| 2. Each side in turn must exhaust his case. | 8. Limits of cross-examination. |
| 3. Anticipatory rebuttal. | 9. — of party testifying in own behalf. |
| 4. Right of rebuttal. | 10. Cross-examination at large. |
| 5. Defendant's right of reply. | 11. Several defendants. |
| 6. Receiving conditionally on promise to connect. | 12. Counterclaim. |
| | 13. Reopening. |

1. Discretion of the court.

Generally the order of proof rests in the sound discretion of the trial court,¹ and the exercise of this discretion is not reviewable² except for manifest abuse.³ Statutes controlling the order of proof almost uniformly permit the statutory order to be varied in the court's discretion.⁴

¹*Nutter v. O'Donnell*, 6 Colo. 253; *Doane v. Cummins*, 11 Conn. 152; *Haleton v. LeDuc*, 10 App. D. C. 379; *Cook County Comrs. v. Harley*, 174 Ill. 412, 51 N. E. 754, Affirming 75 Ill. App. 218; *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272; *Wells v. Kavanagh*, 74 Iowa, 372, 37 N. W. 780; *Wellersburg & W. N. Pl. Road Co. v. Bruce*, 6 Md. 457; *Watson v. Watson*, 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605; *McDonald v. Peacock*, 37 Minn. 512, 35 N. W. 370; *Consaul v. Sheldon*, 35 Neb. 248, 52 N. W. 1104; *Kent v. Tyson*, 20 N. H. 121; *Trade Ins. Co. v. Barraciff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Morris v. Wadsworth*, 17 Wend. 103; *Ripley v. Arledge*, 94 N. C. 467; *Bowman v. Eppinger* 1 N. D. 21, 44 N. W. 1000; *Bean v. Green*, 33 Ohio St. 444; *Helfrich v. Stem*, 17 Pa. 143; *Dodge v. Goodell*, 16 R. I. 48, 12 Atl. 236; *Stephens v. Union Assur. Soc.* 16 Utah, 22, 50 Pac. 626; *State v. Magoon*, 50 Vt. 333; *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946.

But the discretion of the trial court with respect to the order of proof will not authorize it to exclude legal evidence offered in its proper order. *McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293.

²*Drum v. Harrison*, 83 Ala. 384, 3 So. 715; *Dubuque v. Coman*, 64 Conn. 475, 30 Atl. 777; *Bannon v. Warfield*, 42 Md. 22; *Morse v. Woodworth*, 155

Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 743.

This rule seems also to obtain in the Federal courts and in Illinois. *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 463, 10 L. ed. 535, 543; *Johnston v. Jones*, 1 Black, 210, 227, 17 L. ed. 117, 122; *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283; *Turner v. United States*, 30 U. S. App. 90, 66 Fed. Rep. 280, 13 C. C. A. 436; *Lansburgh v. Wimsatt*, 7 App. D. C. 271; *Birmingham v. Pettit*, 21 D. C. 209; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 36, 50 N. E. 1023, Affirming 65 Ill. App. 21. But see, as intimating that the discretion may be revised for abuse, *Golbsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; *Throckmorton v. Holt*, 12 App. D. C. 552; *Olmstead v. Webb*, 5 App. D. C. 38; *Washington Ice Co. v. Bradley*, 171 Ill. 255, 49 N. E. 519, Affirming 70 Ill. App. 313.

**Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Walker v. Walker*, 14 Ga. 242; *Western U. Teleg. Co. v. Buskirk*, 107 Ind. 549, 8 N. E. 557; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Maier v. Massachusetts Ben. Asso.* 107 Mich. 687, 65 N. W. 552; *Winterton v. Illinois C. R. Co.* 73 Miss. 831, 20 So. 157; *Bell v. Jamison*, 102 Mo. 71, 14 S. W. 714; *McCleneghan v. Reid*, 34 Neb. 472, 51 N. W. 1037; *Dosch v. Diem*, 176 Pa. 603, 35 Atl. 207; *San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584; *Lewis v. Alkire*, 32 W. Va. 504, 9 S. E. 890; *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46, 31 Pac. 411; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891.

But a party is entitled to a decision in the exercise of this discretion, and it is error for the court to reject *suo sponte* on an illegal ground evidence which it had the discretion to reject as offered out of the regular order. *French v. Hall*, 119 U. S. 152, 30 L. ed. 375, 7 Sup. Ct. Rep. 170.

**Lowenstein v. Finney*, 54 Ark. 124, 15 S. W. 153; *Matts v. Borba* (Cal.) 37 Pac. 159; *Denver v. Dunsmore*, 7 Colo. 329, 3 Pac. 705; *McNichols v. Wilson*, 42 Iowa, 385; *Gandy v. Early*, 30 Neb. 183, 46 N. W. 418; *Morris v. Faurot*, 21 Ohio St. 155, 8 Am. Rep. 45; *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652. Similar statutes exist in a number of other states.

In *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432, a peculiar Code provision that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief" is held to be merely a rule of practice, and its violation is not cause for reversal where the appellant has not been prejudiced.

. Each side in turn must exhaust his case.

As a general rule he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case; then the evidence of the adversary is heard, and, finally, the party who had the opening may introduce rebutting evidence which merely serves to answer or qualify his adversary's case.¹ Rebutting evidence within this rule means not all evidence whatever which contradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirma-

tive case or fact which defendant has attempted to prove.² Neither side ought to be permitted to give evidence by piecemeal.³

This rule does not prevent a party who has closed his case from supporting it further by the cross-examination of his adversary's witnesses,⁴ nor from using parts of documents which the adversary has put in for the purpose of using other parts against him. And the judge has discretionary power to receive evidence in chief during the rebuttal.⁵

¹*Braydon v. Goulman*, 1 T. B. Mon. 116; *Silverman v. Foreman*, 3 E. D. Smith, 322; *Pettibone v. Derringer*, 4 Wash. C. C. 215, Fed. Cas. No. 11,043; *Gilpins v. Consequa*, Pet. C. C. 85, 3 Wash. C. C. 184, Fed. Cas. No. 5,452; *Robinson v. Parker*, 11 App. D. C. 132; *Macullar v. Wall*, 6 Gray, 507; *Hathaway v. Hemingway*, 20 Conn. 195; *Belden v. Allen*, 61 Conn. 173, 23 Atl. 963; *Bannon v. Warfield*, 42 Md. 22, 39; *Walker v. Walker*, 14 Ga. 242, 250; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Babcock v. Babcock*, 46 Mo. 243; *Ludden v. Sumter*, 47 S. C. 335, 25 S. E. 150; *State v. Fox*, 25 N. J. L. 566; *Hastings v. Palmer*, 20 Wend. 225; *Ford v. Niles*, 1 Hill, 300; *Marshall v. Davies*, 78 N. Y. 414, 420; *Reversing* 16 Hun. 606; *Agate v. Morrison*, 84 N. Y. 672; *Duffy v. Hickey*, 68 Wis. 380, 32 N. W. 54.

In Maine it appears to be of course to allow the party to give cumulative evidence after closing, unless notified then by the judge that he will not be allowed to do so. *Dane v. Treat*, 35 Me. 198. The rule is not strictly applied in New Hampshire. *Pierce v. Wood*, 23 N. H. 519. And it has been held that the order in which a party shall offer his evidence is for his counsel to determine, unless it is made to appear to the court that some undue advantage is attempted. *McDaneld v. Logi*, 143 Ill. 487, 32 N. E. 423. And that evidence, whenever received, is, unless objected to, properly before the court. *Alling v. Forbes*, 68 Conn. 575, 37 Atl. 390.

But where the witnesses are numerous a rule announced in advance, that merely cumulative testimony will not be received in rebuttal, may be enforced unless it clearly prejudices the complaining party. *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673.

In some of the states plaintiff having rested with a prima facie case is allowed to support it further during rebuttal. *Clayes v. Ferris*, 10 Vt. 112; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Mayer v. Walker*, 82 Tex. 222, 17 S. W. 505. Unless defendant gave no contrary evidence. *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768. So, in Iowa, plaintiff in an action on a policy of fire insurance may first introduce evidence of the value of the insured property in rebuttal of defendant's evidence upon that point, the policy being made by statute prima facie evidence of such value. *Martin v. Capital Ins. Co.* 85 Iowa, 643, 52 N. W. 534. And in Georgia a widow who has rested with a prima facie case, in an action against a railway company for her husband's death, by proving the injury and his freedom from negligence, may show that the company's defense that it was not negligent is not true. *Central R. & Bkg. Co. v. Nash*, 81 Ga. 580, 7 S.

E. 808. And facts confirmatory of a prima facie case cannot be withheld and offered in rebuttal unless they do in fact rebut the defendant's case. *Toledo & O. C. R. Co. v. Wales*, 11 Ohio C. C. 371.

**Silverman v. Foreman*, 3 E. D. Smith, 322 (opinion by Woodruff, J.), Approved in *Marshall v. Davies*, 78 N. Y. 414, 420, Reversing 16 Hun, 606; *Watkins v. Rist*, 68 Vt. 486, 35 Atl. 431; *Thompson v. Clay*, 60 Mich. 627, 27 S. W. 699. And see reasoning in *Goss v. Turner*, 21 Vt. 437.

But rebutting testimony to that of a specified witness is any evidence which bears against the truth or accuracy of his testimony. *Davis v. Covington & M. R. Co.* 77 Ga. 322, 2 S. E. 555.

**Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Braydon v. Goulman*, 1 T. B. Mon. 116; *Bannon v. Warfield*, 42 Md. 22, 39.

*It is competent for a party, after having closed his case so far as relates to the evidence, to introduce additional evidence by the cross-examination of the witnesses on the other side, for the purpose of more fully proving his case. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. So, a party may introduce in evidence a document in support of his claim which is proved after the close of his case by cross-examination of the attesting witness called by his adversary for other purposes. *Carruth v. Bayley*, 14 Allen, 532. And a party may, in the discretion of the court, support his case by eliciting from his adversary's witnesses on cross-examination evidence which would be legitimate in rebuttal. *Ranney v. St. Johnsbury & L. C. R. Co.* 67 Vt. 594, 32 Atl. 810.

But plaintiff cannot, after he has closed his case, cross-examine defendant's witness on a subject not a part of his examination in chief and upon which plaintiff has offered no evidence, although, if material, it was a part of his opening case. *Carey v. Hart*, 63 Vt. 424, 21 Atl. 537.

**Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *State v. Alford*, 31 Conn. 40; *Morehouse v. Morehouse*, 70 Conn. 420, 30 Atl. 516; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L. R. A. 33, 9 So. 661; *Walker v. Walker*, 14 Ga. 242; *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Miller v. Preble*, 142 Ind. 632, 42 N. E. 220; *Braydon v. Goulman*, 1 T. B. Mon. 116; *Rosquist v. D. M. Gilmore Furniture Co.* 50 Minn. 192, 52 N. W. 385; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120.

3. Anticipatory rebuttal.

A party may properly be allowed as part of his case in chief to give evidence to rebut matter which his adversary avows an intention of relying on.¹ But he is not required to do so.² If he does so he makes it part of his case and further evidence on the point is not of right allowable in rebuttal.³

**Dimick v. Downs*, 82 Ill. 570, 572; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Williams v. Dewitt*, 12 Ind. 309; *York v. Pease*, 2 Gray, 282; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; *Baneroft v. Sheehan*, 21 Hun, 550; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319 (the avowal here was in answer to a question put by the judge); *Jones v. New York, N. H. &*

H. R. Co. 20 R. I. 210, 37 Atl. 1033. *Dictum* to contrary in *United States v. Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382.

In some jurisdictions the admission of such evidence is an irregularity, but not prejudicial error where the other party afterwards adduces evidence which would have made the admitted evidence relevant in rebuttal. *East Tennessee, V. & G. R., Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828; *Easley v. Missouri P. R. Co.* 113 Mo. 236, 20 S. W. 1073.

But plaintiff cannot properly give evidence of his residence, although defendant has pleaded a judgment in garnishment rendered in another state, until defendant has introduced some evidence of the judgment. *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83. So, evidence of improvements set up by plaintiff in an action to determine the title to real property as a claim under the Minnesota occupying claimants' act, in reply to defendant's answer in the nature of a complaint in ejectment, is no part of the plaintiff's case in chief. *Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565.

²*Dodge v. Dunham*, 41 Ind. 186; *Bancroft v. Sheehan*, 21 Hun, 550; *Laubenthal v. Bach*, 19 Mont. 177, 47 Pac. 803.

Plaintiff in a civil action for slander is not called upon to prove a good character until defendant by his testimony has attempted to cast suspicion upon it. *Cooper v. Francis*, 37 Tex. 445.

A party is not bound to prove payment of a claim set off against his cause of action until his adversary has concluded his proof tending to establish it. *Luke v. Bruner*, 15 Iowa, 3.

Plaintiff in an action on a note cannot be compelled to give evidence on the question of the defense of no consideration, in advance of the defendant's evidence. *Andrews v. Hayden*, 10 Ky. L. Rep. 1049, 11 S. W. 428.

³*Casey v. Le Roy*, 38 Cal. 697; *Williams v. Dewitt*, 12 Ind. 309 (where it was held error to allow it, citing *Browne v. Murray*, Ryan & M. 254); *Dugan v. Anderson*, 36 Md. 567, 588, 11 Am. Rep. 509; *Herrick v. Swomley*, 56 Md. 439; *Holbrook v. McBride*, 4 Gray, 215.

4. Right of rebuttal.

A party has a right in rebuttal to give evidence which tends to meet the affirmative case, if any, sought to be established by his adversary,¹ and it is error to refuse it;² and it is no objection to such evidence that it incidentally tends also to corroborate the party's case in chief³ nor that it may necessitate allowing the adverse party a surrebuttal.⁴

¹*Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L. R. A. 399, 24 N. E. 221; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Bounds v. Little*, 79 Tex. 128, 15 S. W. 225; *St. Paul Plow Works v. Starling*, 140 U. S. 184, 35 L. ed. 404, 11 Sup. Ct. Rep. 803; *Hallam v. Post Pub. Co.* 55 Fed. Rep. 456; *Manhattan L. Ins. Co. v. O'Neil*, 61 U. S. App. 470, 90 Fed. Rep. 463, 33 C. C. A. 607; *Lanning v. Chicago, B. & Q. R. Co.* 68 Iowa, 502, 27 N. W. 478.

Evidence is admissible in rebuttal of a defense set up in the pleadings and supported by testimony, notwithstanding the withdrawal of such de-

fense by consent of court and counsel. *Bullman v. North British & M. Ins. Co.* 159 Mass. 118, 34 N. E. 169.

A party need not rely upon the general evidence of his opening case to overcome a specific point developed by the defense, but may give such point a direct specific denial in rebuttal. *Stillwell v. Farewell*, 64 Vt. 286. 24 Atl. 243. A party may in the discretion of the court give testimony in rebuttal contradictory of that which he gave in chief. *Warden v. Nolan*, 10 Ind. App. 334, 37 N. E. 821; *De Remer v. Parker*, 19 Colo. 242, 34 Pac. 980.

**Tucker v. Tucker*, 113 Ind. 272, 13 N. E. 710; *Chase v. Lee*, 59 Mich. 237, 26 N. W. 483; *Jennings v. Gorman*, 19 Mont. 545, 48 Pac. 1111; *Bancroft v. Sheehan*, 21 Hun, 550; *Odell v. McGrath*, 21 App. Div. 252 (judgment reversed in each case for exclusion of such evidence); *Pokriefka v. Mac-kurat*, 91 Mich. 399, 51 N. W. 1059.

Pleadings in a former case introduced by defendant as admissions by the plaintiffs after the latter have closed their direct evidence constitute new matter which is properly subject to rebuttal, and the exclusion of the rebutting evidence is ground for reversal. *Robinson v. Parker*, 11 App. D. C. 132.

**State v. Hartigan*, 19 N. H. 248; *Chadbourn v. Franklin*, 5 Gray, 312; (opinion by Shaw, Ch. J.); *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

But evidence essential to plaintiff's recovery cannot be withheld and presented for the first time on rebuttal, even though it tends in some degree to rebut the defendant's evidence. *Moehn v. Moehn*, 105 Iowa, 710, 75 N. W. 521.

**Scott v. Woodward*, 2 McCord L. 161.

5. Defendant's right of reply.

After plaintiff's rebuttal defendant has a right in reply to give evidence which tends to meet the affirmative case, if any, or any new and distinct fact sought to be established by plaintiff's rebuttal which defendant had not opportunity of meeting in his case in chief; and it is error to refuse it.¹

**Clayes v. Ferris*, 10 Vt. 112; *Kent v. Lincoln*, 32 Vt. 591; *National Benefit Asso. v. Harding*, 7 Ohio C. C. 438.

Asay v. Hay, 89 Pa. 77. The court says: "Had it been competent for the defendant to prove, in chief, what he offered in rebuttal, the court might have refused a re-examination of the witness. As to matters that require explanation or as to new matter introduced by the opposing interest, a party has a right, in rebuttal, to re-examine his witnesses." So held where the evidence was, incidentally at least, cumulative, but the plaintiff could not have been prejudiced. *Walker v. Fields*, 28 Ga. 237.

A party may offer evidence in reply to deny, modify, or explain evidence admitted on rebuttal which should have been given in chief. *Gandy v. Early*, 30 Neb. 183, 46 N. W. 418; *Woody v. Dean*, 24 S. C. 499. The rule in Vermont, however, strictly excludes evidence in reply on any

point defendant has already had full opportunity to meet. *Thayer v. Davis*, 38 Vt. 163.

Evidence properly admissible in chief to sustain the defense will generally be excluded where offered on surrebuttal. *Brown v. Hiatt*, 16 Ind. App. 340, 45 N. E. 481; *Arnold v. Pfoutz*, 117 Pa. 103, 11 Atl. 871; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125. Even though defendant did not discover the existence of such evidence until after resting its defense. *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 548, 68 N. W. 182. The right of defendant to introduce testimony in reply is limited to the new matters brought out in the rebuttal. *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731. Therefore he is without the right to reply where plaintiff's evidence in rebuttal is confined to counterevidence to defendant's testimony. *Walker v. Columbia & G. R. Co.* 25 S. C. 141.

In contradicting the adversary's evidence that a particular interview was had, testimony that no such interview ever occurred does not let in evidence in rebuttal that such an interview was had at another time. *Marshall v. Davies*, 78 N. Y. 414, 420.

6. Receiving conditionally on promise to connect.

If evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the court may receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterwards.¹

¹*United States v. Flowery*, 1 Sprague, 109, Fed. Cas. No. 15,122; *Deery v. Cray*, 10 Wall. 263, 19 L. ed. 887; *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283; *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Crosett v. Whelan*, 44 Cal. 200; *Dougherty v. Welch*, 53 Conn. 558, 5 Atl. 704; *Martin v. Williams*, 40 Kan. 153, 19 Pac. 551; *Pasquier's Succession*, 12 La. Ann. 758; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525; *Place v. Minster*, 65 N. Y. 89 (conspiracy); *McDougald v. Coward*, 95 N. C. 368; *Diehl v. Emig*, 65 Pa. 429; *Deitz v. Providence Washington Ins. Co.* 33 W. Va. 526, 11 S. E. 50.

But the practice is not to be commended (*Buist v. Guice*, 96 Ala. 255, 11 So. 280; *Central Pennsylvania Teleph. & S. Co. v. Thompson*, 112 Pa. 118, 3 Atl. 439; *Gould v. Dwellinghouse Ins. Co.* 134 Pa. 570, 19 Atl. 793), and is a matter of favor, not of right. *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

In some instances such evidence has been so admitted where no promise to connect seems to have been made. *Foley v. Tipton Hotel Asso.* 102 Iowa, 272, 71 N. W. 236; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *McDermott v. Judy*, 67 Mo. App. 647; *Starr v. Gregory Consol. Min. Co.* 6 Mont. 485, 13 Pac. 195; *Merchants' Exchange Nat. Bank v. Wallach*, 20 Misc. 309, 45 N. Y. Supp. 885; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832. But see as to the necessity of a promise, *Cheatham v. Wilber*, 1 Dak. 321, 46 N. W. 580; *Ward v. Montgomery*, 57 Ind. 278; *Baker v. Swan*, 32 Md. 355; *Pier v. Hein-*

richoffen, 52 Mo. 333; *Cass v. New York & N. H. R. Co.* 1 E. D. Smith, 522.

If the evidence does not prove relevant the judge's instructions may, perhaps, not cure the error; but the error, if any, in admitting irrelevant evidence, is cured by the subsequent introduction of testimony rendering it relevant. *Bell v. Chambers*, 38 Ala. 660; *McCoy v. Watson*, 51 Ala. 466; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 607, 54 N. W. 492; *Lyons v. Davis*, 30 N. J. L. 301.

7. Exhausting witnesses and subjects.

It is within the court's discretion to require a party calling a witness to complete his examination exhaustively before calling another;¹ but it is error to refuse to allow a witness whose examination has been closed to be recalled for a rebuttal which involves a new subject or a contradiction of what there was not opportunity to contradict on the direct.²

Subject to this rule it is not improper to require a party adducing evidence upon a subject to exhaust all his evidence as to that subject before proceeding to another;³ and whether, after giving evidence on another part of his case, he shall be permitted to return and resume the former subject, is in the discretion of the court.

¹It is generally discretionary with the trial court to grant or refuse an application for leave to recall a witness who has been examined and dismissed from the stand. *Morningstar v. State*, 59 Ala. 30; *Phelps v. McGloan*, 42 Cal. 298; *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899, citing Cal. Code Civ. Proc. § 2050; *Hollingsworth v. State*, 79 Ga. 605, 4 S. E. 560; *Anthony v. State* (Idaho) 55 Pac. 884, citing Id. Rev. Stat. § 6081; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251, Affirming 73 Ill. App. 48; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Samuels v. Griffith*, 13 Iowa, 103; *Fowler v. Strawberry Hill*, 74 Iowa, 644, 38 N. W. 521; *Brown v. State*, 72 Md. 468, 20 Atl. 186; *Girault v. Adams*, 61 Md. 1, 9; *Beaulieu v. Parsons*, 2 Minn. 37, Gil. 26; *Cummings v. Taylor*, 24 Minn. 24; *Johnston v. Mason*, 27 Mo. 511; *People v. Mather*, 4 Wend. 229, 249, 21 Am. Dec. 122; *Treadwell v. Stebbins*, 6 Bosw. 538, 549; *Lindheim v. Duys*, 11 Misc. 16, 31 N. Y. Supp. 870; *Brandon v. Lake Shore & M. S. R. Co.* 8 Ohio C. D. 642; *State v. Robinson*, 32 Or. 43, 43 Pac. 357; *Huff v. Latimer*, 33 S. C. 598, 11 S. E. 758.

²A witness may be recalled to supply omissions in testimony (*French v. Canton*, A. & N. R. Co. 74 Miss. 542, 21 So. 299; *Woolsey v. Ellenville*, 84 Hun, 236, 32 N. Y. Supp. 543; *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151), and to correct or explain his testimony (*Walker v. Walker*, 14 Ga. 242; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Williams v. Sargeant*, 46 N. Y. 481; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535), and to restate his testimony where a difference of opinion arises on the argument as to what he has testified. *Hayes v. State*, 36 Tex. Crim. Rep. 146, 35 S. W. 983. Or if the witness is not at hand the judge may refer to his notes or the stenographer's

minutes. *Long v. State*, 12 Ga. 293 (So held where the judge's notes were kept pursuant to direction of statute). And upon a request by the jury after retiring a witness may be recalled to repeat testimony as to which they are in doubt. *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790; *Blackley v. Sheldon*, 7 Johns. 32; *Warner v. New York C. R. Co.* 52 N. Y. 437, 441, 11 Am. Rep. 724 (per Folger, J.); *Virginia v. Zimmerman*, 1 Cranch, C. Ct. 47, Fed. Cas. No. 16,968. But where a document not at hand is needed to settle a dispute between counsel arising during the argument, time to search for the paper or to establish a copy may be denied. *McLendon v. Frost*, 57 Ga. 448, 459.

¹*Mississippi & T. R. Co. v. Gill*, 66 Miss. 39, 5 So. 393; *Jones v. Smith*, 64 N. Y. 180, 184. Otherwise where the evidence sought to be contradicted is immaterial. *Layton v. Kirkendall*, 20 Colo. 236, 38 Pac. 55.

²*Rowe v. Brenton*, 3 Mann. & R. 133, 139.

8. Limits of cross-examination.

A party has no right, before his adversary's case is closed, to introduce his own case to the jury by cross-examining the witness of his adversary on matters beyond the limit of the direct examination of such witness.¹

¹*Bowman v. White*, 110 Cal. 23, 42 Pac. 470; *Wheeler & W. Mfg. Co. v. Barrett*, 172 Ill. 610, 50 N. E. 325, Affirming 70 Ill. App. 222; *Britton v. State ex rel. Rowe*, 115 Ind. 55, 17 N. E. 254; *Bulliss v. Chicago, M. & St. P. R. Co.* 76 Iowa, 680, 39 N. W. 245; *DeLissa v. Fuller Coal & Min. Co.* 59 Kan. 319, 52 Pac. 886; *Sterling v. Bock*, 37 Minn. 29, 32 N. W. 865; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Neil v. Thorn*, 88 N. Y. 270; *Ernst v. Estey Wire Works Co.* 21 Misc. 68, 46 N. Y. Supp. 918; *Olive v. Olive*, 95 N. C. 485; *Ellmaker v. Buckley*, 16 Serg. & R. 72; *Denniston v. Philadelphia Co.* 161 Pa. 41, 28 Atl. 1007; *First Nat. Bank v. Smith*, 8 S. D. 101, 65 N. W. 439, Affirming on rehearing 8 S. D. 7, 65 N. W. 437; *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226; *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080; *Goddard v. Crefeld Mills*, 45 U. S. App. 84, 75 Fed. Rep. 818, 21 C. C. A. 530. *Contra*, *Dillard v. Samuels*, 25 S. C. 318. But the fact that evidence called forth by a legitimate cross-examination tends to sustain a cross action or counterclaim affords no reason for its exclusion. *Rush v. French*, 1 Ariz. 139, 25 Pac. 816.

For the limit of a strict cross-examination within the meaning of this rule, see Division VII. § 24.

9. — of party testifying in own behalf.

A greater latitude is allowable in the cross-examination of a party who testifies on his own behalf;¹ but even there the limits of the cross-examination beyond the scope of the direct are in the discretion of the judge.²

¹See Division VII. § 24.

¹*Rea v. Missouri*, 17 Wall. 542, 21 L. ed. 709; *Lange v. Manhattan R. Co.* 46 N. Y. S. R. 868, 19 N. Y. Supp. 1022 (refusing to permit the defense to be proved upon the cross-examination of the plaintiff before he rests).

10. Cross-examination at large.

It is in the discretion of the court, in controlling the order of proof, to allow cross-examining counsel to go beyond the limits of strict cross-examination, and introduce matters in support of his own case.¹

¹*Huntsville Belt Line & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Thornton v. Hook*, 36 Cal. 223; *Harrington v. Butte & B. Min. Co.* 19 Mont. 411, 48 Pac. 758; *Neil v. Thorn*, 88 N. Y. 270, 276 (*dictum*); *American Encaustic Tiling Co. v. Reich*, 35 N. Y. S. R. 579, 12 N. Y. Supp. 927; *Pollatschek v. Goodwin*, 17 Misc. 587, 40 N. Y. Supp. 682, Affirming 16 Misc. 686, 38 N. Y. Supp. 971; *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 300. *Contra*, *Bell v. Prewitt*, 62 Ill. 361 (reversing judgment for allowing cross-examination at large).

11. Several defendants.

Where there are several defendants having separate defenses it is in the discretion of the judge in what order they shall cross-examine, present their case, and sum up.¹ If their interests are identical they may be confined to one counsel in so doing for all, as if their defense was joint.²

¹*Fletcher v. Crosbie*, 2 Moody & R. 417.

"If several defendants having separate defenses appear by different counsel the court must determine their relative order in the evidence and argument." Cal. Code Civ. Proc. § 607. Similar statutory provisions exist in several other states.

²*Chippendale v. Masson*, 4 Campb. 174; *Mason v. Ditchbourne*, 1 Moody & R. 462, note.

12. Counterclaim.

Where a counterclaim is interposed, beside denials or other defenses to the cause of action, it is in the discretion of the court to try both together, or to postpone defendant's evidence as to his counterclaim, including his examination of plaintiff thereon, until after the close of plaintiff's case.¹

¹*Thompson v. Woodfine*, 38 L. T. N. S. 753, 26 Week. Rep. 678, 47 L. J. Ch. N. S. 832.

13. Reopening.

After either¹ or both² parties have rested, the admission or exclusion of further evidence is in the discretion of the judge; and this discretion extends to evidence offered during³ and after⁴ the argument

and even after the cause has been submitted to the jury,⁵ but an exception may be taken, and if the ruling be an abuse of discretion relief may be had.⁶ On reopening the case the court may prescribe the extent and limits thereof;⁷ and after taking further evidence has been commenced a party has a right to complete it⁸ but not to go beyond the limits prescribed⁹

¹*Hoey v. Fletcher*, 39 Fla. 325, 22 So. 716; *Giffen v. Lewiston* (Idaho) 55 Pac. 545; *Corkery v. Security F. Ins. Co.* 99 Iowa, 382, 68 N. W. 792, citing McClain's (Iowa) Code, § 4006; *Hill v. Miller*, 50 Kan. 659, 32 Pac. 354; *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb. 90, 48 N. W. 879; *Carradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. 1020; *Myers v. Maverick* (Tex. Civ. App.) 27 S. W. 1083, Affirming on Rehearing 27 S. W. 950.

The court in its discretion may grant or refuse plaintiff permission to introduce further testimony after a motion for nonsuit has been interposed (*Kelly v. E. F. Hallack Lumber & Mfg. Co.* 22 Colo. 221, 43 Pac. 1003; *Trumbull v. O'Hara*, 68 Conn. 33, 35 Atl. 764; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576) (*Featherston v. Wilson*, 123 N. C. 623, 31 S. E. 843); and after the motion has been argued (*Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Wingo v. Caldwell*, 35 S. C. 609, 14 S. E. 827) and denied. *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458, Reversing on Rehearing 30 Pac. 841. So the court may permit plaintiff to introduce further testimony after defendant's request for a peremptory instruction has been made (*Ballowe v. Hillman*, 18 Ky. L. Rep. 677, 37 S. W. 950), and decided (*Illinois C. R. Co. v. Griffin*, 53 U. S. App. 22, 80 Fed. Rep. 278. 25 C. C. A. 413), and while defendant's demurrer to the evidence is argued (*Oberlander v. Confrey*, 38 Kan. 462, 17 Pac. 88), and after the demurrer has been sustained (*Farmers' & M. Bank v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680); and may reject cumulative evidence offered by plaintiff after he has closed his case and a verdict has been directed for defendant. *American Eagle Tobacco Co. v. Peirce*, 70 Mich. 633, 38 N. W. 605.

²*Miller v. Sharp*, 49 Cal. 233; *Plummer v. Struby-Estabrooke Mercantile Co.* 23 Colo. 190, 47 Pac. 294; *Macon v. Harris*, 75 Ga. 761; *Willard v. Pettitt*, 153 Ill. 663, 39 N. E. 991, Affirming 54 Ill. App. 257; *McNutt v. McNutt*, 116 Ind. 545, 2 L. R. A. 372, 19 N. E. 115; *Hartley State Bank v. McCorkell*, 91 Iowa, 660, 60 N. W. 197; *State v. Bussey*, 58 Kan. 679, 50 Pac. 891; *Vicksburg Liquor & Tobacco Co. v. Jefferies*, 45 La. Ann. 621, 12 So. 743; *Minkley v. Springwells Twp.* 113 Mich. 347, 71 N. W. 649; *Nelson v. Finseth*, 55 Minn. 417, 57 N. W. 141; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282, Affirming 56 Barb. 425; *Williams v. Hayes*, 20 N. Y. 58; *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936; *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652, citing Hill's (Or.) Anno. Laws, §§ 196, 830; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *Calkins v. Scabury-Calkins Consol. Min. Co.* 5 S. D. 299, 58 N. W. 797; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535. Even if the further testimony be the re-examination of a witness who has once been examined. *People v. Rector*, 19 Wend. 569.

The English rule, which is somewhat more strict than the American, still allows that if a party is taken by surprise at the statements made by the other side, on a point that is relevant and which he has had no opportunity of meeting, and on which there has been no cross-examination, the court has power to reopen the case, and even a witness already examined may be recalled. *Rogers v. Manley*, 42 L. T. N. S. 585, citing *Taylor*, Ev. 6th ed. ¶ 359, p. 392.

**Lowenstein v. Finney*, 54 Ark. 124, 15 S. W. 153; *Hilburn v. Hilburn*, 105 Ga. 471, 30 S. E. 656; *McDonald v. Fairbanks, M. & Co.* 161 Ill. 124, 43 N. E. 783, Affirming 58 Ill. App. 384; *Henry County Comrs. v. Slatte*, 52 Ind. 171; *McComb v. Council Bluffs Ins. Co.* 83 Iowa, 247, 48 N. W. 1038, citing Iowa Code, § 2799; *Lake v. Weaver*, 20 R. I. 46, 37 Atl. 302; *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *Phoenix Ins. Co. v. Swann* (Tex. Civ. App.) 41 S. W. 519; *Buchanan v. Cook*, 70 Vt. 168, 40 Atl. 102; *State v. Powell*, 40 La. Ann. 241, 4 So. 447.

**Seckel v. Norman*, 78 Iowa, 254, 43 N. W. 190; *State v. Martin*, 89 Me. 117, 35 Atl. 1023; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785; *Sisler v. Shaffer* 43 W. Va. 769, 28 S. E. 721; *Everman v. Menomonie*, 81 Wis. 624, 51 N. W. 1013. If admitted, the adverse party should be allowed to rebut it. *George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350.

**Cook v. Ottawa University*, 14 Kan. 548; *Com. v. Ricketson*, 5 Met. 412 (dictum, sanctioning course of judge in allowing a witness to be called to testify on a point as to which the jury inquired); *Henlow v. Leonard*, 7 Johns. 200; *Royston v. Illinois C. R. Co.* 67 Miss. 376, 7 So. 320; *Keaveny v. Ottman*, 26 Ohio L. J. 65; *Contra, Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742.

Even after verdict it is discretionary to admit further evidence. *West v. Ela*, 42 Kan. 334, 21 Pac. 1043; *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926; *Contra, Re Thompson*, 9 Mont. 381, 23 Pac. 933.

**St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia*, 55 Ark. 163, 18 S. W. 43; *Smith v. State Ins. Co.* 58 Iowa, 487, 12 N. W. 542; *Wagar v. Bowley*, 104 Mich. 38, 62 N. W. 293; *Stein v. Roeller*, 66 Minn. 283, 68 N. W. 1087; *Meacham v. Moore*, 59 Miss. 561; *Owen v. O'Reilly*, 20 Mo. 603; *Meyer v. Cullen*, 54 N. Y. 392. But see *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215; *Fort Worth & D. C. R. Co. v. Johnson*, 5 Tex. Civ. App. 24, 23 S. W. 827. Compare as to remedy 1 Graham, Pr. 3d ed. 740. *Contra, Kelly v. E. F. Hallack Lumber & Mfg. Co.* 22 Colo. 221, 43 Pac. 1003; *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *State v. Martin*, 89 Me. 117, 35 Atl. 1023; *Ohlendorf v. Kanne*, 66 Md. 495, 8 Atl. 351; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785.

**State v. Harris*, 63 N. C. 1.

**Mobile Fire Dept. Ins. Co. v. Parsons*, 11 N. Y. Week. Dig. 414.

**Stephens v. Fox*, 83 N. Y. 313, Affirming 17 Hun, 435; *Omaha Real Estate & T. Co. v. Kragscow*, 47 Neb. 592, 66 N. W. 658.

VII.—EXAMINATION OF WITNESSES.

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1. Examination to test competency.

Under the old practice objections to the competency of a witness could only be taken by either examining him on his *voir dire*¹ or by calling other witnesses to establish the fact on which the objection rested.² A resort to one method precluded the use of the other.³ The strictness of this rule has been somewhat relaxed, so that, while the objection should, if known, be made before the witness has testified in chief, a party may permit the witness to be sworn in chief, and raise the objection to his competency at any time during his examination,⁴ subject to the qualification that such objection be made as soon as the incompetency is discovered.⁵

Before a witness can be permitted to give his opinion as an expert his competency must be established by a preliminary examination⁶

and the court may, in its discretion, allow a preliminary cross-examination with respect to his qualifications before permitting him to testify.⁷

*The right of the party against whom a witness has been called to have the witness sworn on his *voir dire* and examined touching his competency before he is sworn in chief, when insisted upon, cannot be denied. *Seeley v. Engell*, 13 N. Y. 542, Reversing 17 Barb. 530. But a request that a witness be sworn and examined touching his competency after he has been sworn in chief and his interrogation as a witness actually commenced is properly refused, where the right is accorded to assail his credibility on cross-examination. *State v. Downs*, 50 La. Ann. 694, 23 So. 456. The right to swear a witness on his *voir dire* belongs exclusively to the party objecting to his competency. *Foley v. Mason*, 6 Md. 37; *Wright v. Mathews*, 2 Blackf. 187. But the party offering the witness may cross-examine him for the purpose of removing the disqualification. *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515; *Beach v. Covillaud*, 2 Cal. 237; *Weigel's Succession*, 18 La. Ann. 49; *Fisfield v. Smith*, 21 Me. 383. A witness may be examined on his *voir dire* with reference to the contents of writings not produced, notwithstanding an objection that parol evidence of their contents is inadmissible. *Hernndon v. Givens*, 16 Ala. 261; *Babcock v. Smith*, 31 Ill. 57; *Fisfield v. Smith*, 21 Me. 383.

*Where the incompetency of a witness is established *aliunde*, and not by his own testimony, he cannot be examined himself to remove the objection. *Dent v. Portwood*, 17 Ala. 246; *Hiscox v. Hendree*, 27 Ala. 216; *Diversy v. Will*, 28 Ill. 218; *Robinson v. Turner*, 3 G. Greene, 540.

**Bridge v. Wellington*, 1 Mass. 219; *Walker v. Collier*, 37 Ill. 362; *Stuart v. Lake*, 33 Me. 87; *Dora v. Osgood*, 2 Tyler (Vt.) 28; *Mifflin v. Bingham*, 1 Dall. 273; *Chance v. Hine*, 6 Conn. 231. Otherwise when the inquiry of interest arises at different times and on distinct grounds. *Stebbins v. Sackett*, 5 Conn. 258.

But in *Hooker v. Johnson*, 6 Fla. 730, the fact that a witness answered on his examination *voir dire* that he had no interest was held not to prevent further inquiry. So, after an unsuccessful attempt to exclude a witness on his *voir dire*, his testimony in chief may be stricken out of the case upon a subsequent discovery of his incompetency. *Le Barron v. Redman*, 30 Me. 536. And overruling a preliminary objection to the competency of a witness will not prevent his testimony from being struck out on objection when his incompetency subsequently appears. *Heely v. Barnes*, 4 Denio, 73, *dictum*; *Schillinger v. McCann*, 6 Me. 364.

**Fisher v. Willard*, 13 Mass. 379; *Shurtleff v. Willard*, 19 Pick. 202; *Carter v. Graves*, 7 How. (Miss.) 9; *Hill v. Postley*, 90 Va. 200, 17 S. E. 946.

**Hudson v. Crow*, 26 Ala. 515; *Brooks v. Crosby*, 22 Cal. 42; *State v. Crab*, 121 Mo. 554, 26 S. W. 548; *Lewis v. Morse*, 20 Conn. 211; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Groshon v. Thomas*, 20 Md. 234; *Donelson v. Taylor*, 8 Pick. 389; *Heely v. Barnes*, 4 Denio, 73; *Patterson v. Wallace*, 44 Pa. 88; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430; *Hord v. Colbert*, 28 Gratt. 49. In Georgia a Code provision expressly

requires an objection to competency, if known, to be made before examination. *Brunswick & W. R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84.

The rule is the same where the testimony of a witness is taken by deposition. *Hudson v. Crow*, 26 Ala. 515; *United States v. One Case of Hair Pencils*, 1 Paine, 400. Contra, *Talbot v. Clark*, 8 Pick. 51; *Angell v. Rosenbury*, 12 Mich. 241 (by statute). But is not applicable where the examination of the witness commences under a reservation of the right to object. *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628.

**Polk v. State*, 36 Ark. 117; *Fairbank v. Hughson*, 58 Cal. 314; *Tyler v. Todd*, 36 Conn. 218; *Sandwich Mfg. Co. v. Nicholson*, 32 Kan. 666, 5 Pac. 164; *Lincoln v. Barre*, 5 Cush. 590; *State v. Secrest*, 80 N. C. 450; *Koons v. State*, 36 Ohio St. 195; *Delaware & C. Steam Towboat Co. v. Starrs*, 69 Pa. 36; *Buffum v. New York & B. R. Co.* 4 R. I. 221; *Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170.

The court may itself question the witness. *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991. And other witnesses may be called to testify with respect to his competency (*Mendum v. Com.* 6 Rand. (Va.) 704; *State v. Maynes*, 61 Iowa, 119, 15 N. W. 864; *Martin v. Courtney* (Minn.) 77 N. W. 813), but not after the witness has been permitted to testify as an expert. *Tullis v. Kidd*, 12 Ala. 648; *Washington v. Cole*, 6 Ala. 212; *Brabo v. Martin*, 5 La. 275. Contra, *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837. One expert may testify to the skill of another who has already testified, where his knowledge of such skill is derived from personal observation. *Laros v. Com.* 84 Pa. 200.

A witness cannot be asked whether he has sufficient skill or experience to give an opinion, but should be required to state the facts, from which the court may determine his competency. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Eggart v. State* (Fla.) 25 So. 144.

**Sarle v. Arnold*, 7 R. I. 582; *Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Finch v. Chicago, M. & St. P. R. Co.* 46 Minn. 250, 48 N. W. 915; *Re Gorkow*, 20 Wash. 63, 56 Pac. 385.

The refusal of such preliminary cross-examination was held error in *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; but though held to be a right in *Woodworth v. Brooklyn Elev. R. Co.* 22 App. Div. 501, 48 N. Y. Supp. 80, its denial is not error where the party entitled to it has not been prejudiced thereby.

Cross-examination of an expert bearing upon his credibility as a witness, and not his competency as an expert, need not be allowed before permitting him to testify. *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848.

2. Oath or affirmation.

Without express or implied consent,¹ no evidence can be permitted to go to the jury unless under the sanction of an oath, and it is the duty of counsel offering a witness to see that he is sworn.² A witness who is competent in chief must be sworn generally, although his examination be confined to a particular or incidental fact.³ One oath

is sufficient, although the witness be examined on different days and the matters in issue be varied during the trial.⁴

In some jurisdictions an oath administered with the uplifted hand is substituted for the usual practice of laying the hand upon and kissing the Gospels.⁵ A variation from the strict statutory procedure is not fatal where no objection is made at the time;⁶ and the fact that the oath is more comprehensive than the statute is no objection to its validity.⁷ The common law and the statutes of some states recognize any mode of swearing a witness which he holds to be binding on his conscience, and which is sanctified by the usage of his country or the sect to which he belongs;⁸ and witnesses who have conscientious scruples against taking an oath are generally permitted to affirm.⁹

⁴Acquiescence in the omission to swear a witness will be inferred from a failure to object upon discovery of the neglect. *Slauter v. Whitelock*, 12 Ind. 338; *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377. An objection is too late when first taken after verdict or judgment (*Cady v. Norton*, 14 Pick. 236; *Nesbitt v. Dallam*, 7 Gill. & J. 494, 28 Am. Dec. 236; *Goldsmith v. State*, 32 Tex. Crim. Rep. 112, 22 S. W. 405), but not where the witness supposed he had been sworn until after the testimony was closed, and the parties and counsel remained unacquainted with the omission until after verdict. *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

⁵*Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

That a witness was not sworn before his examination commenced is immaterial where he was subsequently sworn, his testimony repeated, and no portion of it taken prior to the administration of the oath was admitted in evidence. *Com. v. Keck*, 148 Pa. 639, 24 Atl. 161.

As to the necessity of swearing children before permitting them to testify and the duty of the court to instruct a child who, on being called to testify, proves to be ignorant of the nature and obligation of an oath, see note to *State v. Michael* (W. Va.) 19 L. R. A. 605.

⁶*Jackson ex dem. Lowell v. Parkhurst*, 4 Wend. 369.

⁷*Bullock v. Koon*, 9 Cow. 30.

⁸*Doss v. Birks*, 11 Humph. 431; *Jackson v. State*, 1 Ind. 184.

Even where the usual method of administering the oath requires the witness to kiss the Bible, she may be sworn by merely laying her hand upon the book where she says that she had never kissed it and had been told it was not necessary. *Pullen v. Pullen*, 41 N. J. Eq. 136, 5 Atl. 658.

⁹*People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451 (using hymn book by mistake). An oath administered with the uplifted hand without objection is valid, although the witness does not declare as required by statute that he has conscientious scruples against being sworn on the Gospels. *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65.

¹⁰*Ballance v. Underhill*, 4 Ill. 453.

ABB.—9.

**Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541. For instances, see *Fryatt v. Lindo*, 3 Edw. Ch. 239, note; *King v. Morgan*, 1 Leach C. L. 54 (swearing a Mahometan upon the Koran); *Mildrone's Case*, 1 Leach C. L. 412; *Walker's Case*, 1 Leach C. L. 498 (swearing a Scotch covenanter without kissing the Book); *Edmonds v. Rowe*, Ryan & M. 77 (swearing a Christian on the Old Testament); *Omychund v. Baker*, 1 Atk. 21 (swearing a Gentoo by touching the foot of a Brahmin). In *Reg. v. Entrehman*, 1 Car. & M. 248, a Chinese witness was sworn by kneeling down and breaking a saucer, the oath being administered through an interpreter in these words: "You shall tell the truth, the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer."

A witness who believes in a religion other than the Christian may take the usual oath where no objection is made and he testifies that he considers the oath binding (*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78), and an objection to such proceeding is too late when first made after verdict. *Sells v. Hoare*, 7 J. B. Moore, 36, 3 Brod. & B. 232. But he cannot take the usual oath against objection where he does not deny that he still retains the religion of his country nor state that he regards the form of oath taken as binding. *State v. Chyo Chiagk*, 92 Mo. 395, 4 S. W. 704. Where an oath has been administered to a Chinese witness according to the custom and religion of his country it is not error to subsequently administer to him an oath in the statutory form. *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961.

A witness who without objection takes the oath in the usual form may be afterwards asked whether he considers the oath he has taken binding upon his conscience; but if he answers in the affirmative he cannot then be further asked whether he considers any other form of oath more binding. *The Queen's Case*, 2 Brod. & B. 284.

**Atcheson v. Everitt*, 1 Cowp. 389.

Under a statute permitting witnesses who have conscientious scruples against taking an oath, to affirm, it was held in *Williamson v. Carroll*, 16 N. J. L. 217, that a witness who has no objection to being sworn cannot be allowed to affirm. And in *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858, one not a Quaker, who stated that he had conscientious scruples against taking an oath, was not permitted to affirm.

3. Control of the court over examination.

The trial court, in the exercise of its control over the examination of witnesses,¹ may permit testimony to be given in narrative form,² or may require the investigation to proceed by questions and answers.³

The trial judge should protect a witness from needless insinuations and attacks of counsel,⁴ and should see that unnecessarily indecent questions be not asked,⁵ and that some indulgence be granted a witness who is overcome with emotion.⁶ He may properly see that the witness is given a fair opportunity to answer the questions asked him, and in so doing to make any appropriate explanation of his testi-

mony,⁷ and may stop his examination for a time where it seems calculated rather to confuse the witness than to elicit the truth.⁸

The trial court may permit the examination of a witness commenced by one counsel to be continued by another, notwithstanding a court rule providing otherwise,⁹ and may allow a witness to be called from the stand during his examination for consultation with his counsel,¹⁰ and may require counsel to disclose what they expect to prove by a witness before permitting him to testify.¹¹

¹"The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced, and that discretion must be governed in a great measure by a knowledge of the character of the witness and by his demeanor during his examination." *Brown v. Burrus*, 8 Mo. 26.

²*Northern P. R. Co. v. Charless*, 7 U. S. App. 359, 51 Fed. Rep. 562, 2 C. C. A. 380.

³*Clark v. Field*, 42 Mich. 342, 4 N. W. 19.

But an attorney trying his own case cannot be required, as a condition of testifying in his own behalf, to give his testimony by question and answer. *Thresher v. Stonington Sav. Bank*, 68 Conn. 201, 36 Atl. 38.

⁴*State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *Clink v. Gunn*, 90 Mich. 135, 51 N. W. 193; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

It is alike the duty of the court to protect a witness unduly dealt by, and to abstain from interference when an examination is properly conducted. *Carney v. State*, 79 Ala. 14. And it is the duty of the court to exercise such restraining authority over counsel when interrogating witnesses to test their truthfulness that unseemly scenes between them and counsel will be avoided. *Baldwin v. St. Louis, K. & N. W. R. Co.* 75 Iowa, 297, 39 N. W. 507.

⁵Vulgar words should never be required of a witness when the truth can be conveyed with equal clearness and accuracy in becoming language. *State v. Laxton*, 78 N. C. 564. The court should not permit a young child to be asked indecent questions, but if a competent witness there is no impropriety in asking him as to the social intimacy of parties. *People v. White*, 53 Mich. 537, 19 N. W. 174.

⁶*State v. Laxton*, 78 N. C. 564.

⁷*Smalls v. State*, 102 Ga. 31, 20 S. E. 153; *Giffen v. Lewiston* (Idaho) 55 Pac. 545.

The court may properly interpose to prevent the unreasonable interruption of a witness by counsel, and permit her to complete an unfinished sentence. *State v. Scott*, 80 N. C. 365.

⁸*Weldon v. Third Ave. R. Co.* 3 App. Div. 370, 38 N. Y. Supp. 206.

⁹*Malone v. Gates*, 87 Mich. 332, 49 N. W. 638.

¹⁰*Huston v. Regn*, 184 Pa. 419, 39 Atl. 208.

A party may, in the court's discretion, be called by his counsel from the witness stand during cross-examination, and be immediately recalled after a consultation with such counsel. *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264.

"*People v. White*, 14 Wend. 111; *Contra, Force v. Smith*, 1 Dana, 151.

4. — over extent of examination.

The court may refuse to allow questions to be repeated which have been fully answered,¹ or to permit further examination upon matters which have already been covered,² and may arrest an examination which is needlessly protracted.³

¹*Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303; *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341; *Aurora v. Hillman*, 90 Ill. 61; *Buck v. Mad-dock*, 167 Ill. 219, 47 N. E. 208, Affirming 67 Ill. App. 466; *Brown v. State*, 72 Md. 468, 20 Atl. 140; *Plew v. State* (Tex. Crim. App.) 35 S. W. 366; *White v. McLean*, 47 How. Pr. 193; *Middlesex Bkg. Co. v. Smith*, 52 U. S. App. 406, 83 Fed. Rep. 133, 27 C. C. A. 485; *Gilliam v. Davis*, 14 Wash. 183, 44 Pac. 152.

²*Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 322, 19 N. W. 17; *Hamilton v. Hulett*, 51 Minn. 208, 53 N. W. 364; *Simon v. Home Ins. Co.* 58 Mich. 278, 25 N. W. 190; *McGuire v. Lawrence Mfg. Co.* 156 Mass. 324, 31 N. E. 3; *State v. Brown*, 100 Iowa, 50, 69 N. W. 277; *Peterson v. Johnson-Wentworth Co.* 70 Minn. 538, 73 N. W. 510; *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40; *People v. Harrison*, 93 Mich. 594, 53 N. W. 725; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075.

³*State v. Miller*, 93 Mo. 263, 6 S. W. 57; *McPhail v. Johnson*, 115 N. C. 298, 20 S. E. 373; *Mulhollin v. State ex rel. Ward*, 7 Ind. 646; *State v. McGee*, 36 La. Ann. 206; *State v. Southern*, 48 La. Ann. 628, 19 So. 668.

But this power should be cautiously and soundly exercised. *Morein v. Solomons*, 7 Rich. L. 97; *Peck v. Richmond*, 2 E. D. Smith, 380.

5. Examination by the court.

The court may interrogate witnesses to elicit material facts suggested by the evidence,¹—especially where the witnesses are reluctant or evasive,² and in so doing may ask leading questions,³ but generally has no more right to ask improper questions than counsel.⁴ The court may ask a witness to repeat his testimony on a particular point,⁵ may recall a witness to supply a material fact overlooked by counsel,⁶ and may even call and examine witnesses not called by either party.⁷ The judge should not, however, take charge of the examination of a witness unless the occasion demands it,⁸ and should be careful, in so do-

ing, not to indicate his own opinion of the witness's testimony.⁹ He should not privately confer with a witness, and then ask questions to elicit the facts as to which he has made inquiry.¹⁰

⁹*De Ford v. Painter*, 3 Okla. 80, 30 L. R. A. 722, 41 Pac. 96; *Huffman v. Cauble*, 86 Ind. 591; *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *Schaefer v. St. Louis & S. R. Co.* 128 Mo. 64, 30 S. W. 331; *Wilson v. Ohio River & C. R. Co.* 52 S. C. 537, 30 S. E. 400; *Lefever v. Johnson*, 79 Ind. 554. It may even be his duty to do so. *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Cobb v. State* (Miss.) 23 So. 1015; *Sparks v. State*, 59 Ala. 82.

It is the duty and province of the trial judge to see that a witness comprehends the questions asked in order that they may be answered understandingly, and he may interrogate a witness for that purpose. *Scroggin v. Johnston*, 45 Neb. 714, 64 N. W. 236.

¹⁰*State v. Spiers*, 103 Iowa, 711, 73 N. W. 343; *Lockhart v. State*, 92 Ind. 452.

It is not only the privilege, but the duty, of the court to propound such questions to reluctant witnesses as will strip them of the subterfuges to which they resort to evade telling the truth. *Varnedoe v. State*, 75 Ga. 181, 58 Am. Rep. 465.

¹¹*State v. Marshall*, 105 Iowa, 38, 74 N. W. 763; *Com. v. Galavan*, 9 Allen, 271; *Long v. State*, 95 Ind. 487. *Contra*, *Hopperwood v. State*, 39 Tex. Crim. Rep. 15, 44 S. W. 841.

People ex rel. Lauchantin v. Lacoste, 37 N. Y. 192; *State v. Marshall*, 105 Iowa, 38, 74 N. W. 763.

¹²*Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

¹³*State v. Lee*, 80 N. C. 483.

¹⁴*Coulson v. Disborough* [1894] 2 Q. B. 316; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357.

¹⁵*Hopperwood v. State*, 39 Tex. Crim. Rep. 15, 44 S. W. 841.

¹⁶*Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151; *McDonald v. State*, 89 Tenn. 164, 14 S. W. 487.

¹⁷*Sparks v. State*, 59 Ala. 82.

6. Exclusion of witnesses.

A motion to require the witnesses to be examined out of the hearing of each other, or, as it is sometimes called, to "put the witnesses under the rule," is generally addressed to the sound discretion of the court.¹ Parties to the cause² and officers of the court³ will generally be exempted from the operation of an order excluding the witnesses, but other exceptions rest in the court's discretion.⁴

Whether or not the court may refuse to permit a witness to testify who has wilfully violated such an order is not free from doubt.⁵ The better rule and the one seemingly supported by the weight of author

ity prevents the court from depriving the party offering the witness of his testimony, where the party has not himself participated in the witness's disobedience.⁶

A witness should not be rejected because he was not placed with the others under the "rule," where the value of his testimony was not known to the party offering it until immediately before he was called,⁷ nor where he has heard none of the evidence in the case.⁸

¹*Hubbell v. Ream*, 31 Iowa, 289; *Purnell v. Purnell*, 89 N. C. 42; *Høy v. Com.* 32 Gratt. 946, 34 Am. Rep. 799; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *People v. McCarty*, 117 Cal. 65, 48 Pac. 984; *Gulf, C. & S. F. R. Co. v. West* (Tex. Civ. App.) 36 S. W. 101. *Contra, Rainwater v. Elmore*, 1 Heisk. 363 (held error to refuse to put the witnesses under the rule when asked upon affidavit of its necessity); *Gregg v. State*, 3 W. Va. 705.

A statute providing "that if either party requires it the judge may exclude from the courtroom any witness of the adverse party not at the time under examination" was construed, in *Johnson v. Clem*, 82 Ky. 84, to leave the question to the exercise of a sound judicial discretion. The exercise of this discretion is not reviewable (*Errissman v. Errissman*, 25 Ill. 136; *Ryan v. Couch*, 66 Ala. 244) except for manifest abuse. *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 74 N. W. 403; *First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619. It is not an abuse of discretion to exclude from the courtroom, under a rule theretofore made, a witness who has testified and is not to be again put on the stand, as announced after the witnesses were put under the rule. *Com. v. Phillips* (Ky.) 12 Ky. L. Rep. 410, 14 S. W. 378. But the denial of a motion to put the witnesses under the rule in a suit to establish a nuncupative will is an abuse of discretion. *Watts v. Holland*, 56 Tex. 54.

²*Bernheim v. Dibrell*, 66 Miss. 199, 5 So. 693; *Larue v. Russell*, 26 Ind. 386; *Tift v. Jones*, 52 Ga. 538.

An officer of a corporation charged with the duty of looking after its interests in a pending trial is a party within the meaning of a Code provision exempting parties from the operation of the rule (*Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879); so also is a proponent of a will who is the principal beneficiary. *Heaton v. Dennis* (Tenn.) 52 S. W. 175. A party in interest, though not a party to the record, should be so exempted (*Chester v. Bower*, 55 Cal. 46), and so should the guardian of a minor defendant. *Cottrell v. Cottrell*, 81 Ind. 87. But a party may be placed under the rule where he refuses to testify first as a condition of not being excluded from the courtroom. *French v. Sale*, 63 Miss. 386.

³*State v. Hopkins*, 50 Vt. 316; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Dement v. State*, 39 Tex. Crim. Rep. 271, 45 S. W. 917; *Allen v. Com.* 10 Ky. L. Rep. 582, 9 S. W. 703; *Gregg v. State*, 3 W. Va. 705.

⁴*Vance v. State*, 56 Ark. 402, 19 S. W. 1066; *Roberts v. State* (Ala.) 25 So. 238 (expert witnesses); *Barnes v. State*, 88 Ala. 204, 7 So. 38; *Central*

R. Co. v. Phillips, 91 Ga. 526, 17 S. E. 952; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5; *Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

A witness who has acquired such an intimate knowledge of the facts by having acted as the authorized agent of either of the parties, that his services are required by counsel in the management of the cause, ought not, especially in the absence of his principal, to be placed under the rule; but the trial court's discretion in not exempting him from the operation of the rule will not be revised on appeal. *Ryan v. Couch*, 66 Ala. 244.

¹In some jurisdictions it is discretionary with the court to allow a witness to testify or not after his disobedience. *Purnell v. Purnell*, 89 N. C. 42; *Thorn v. Kemp*, 98 Ala. 417, 13 So. 749; *Hennessey v. Barnett*, 12 Colo. App. 254, 55 Pac. 197; *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593; *Garlington v. McIntosh* (Tex. Civ. App.) 33 S. W. 389. In others his disobedience may affect his credibility, but not his competency. *Gregg v. State*, 3 W. Va. 705; *Ferguson v. Brown*, 75 Miss. 214, 21 So. 603; *Rooks v. State*, 65 Ga. 330; *Grimes v. Martin*, 10 Iowa, 347; *Friedman v. Myers*, 39 N. Y. S. R. 192, 14 N. Y. Supp. 142.

²*People v. Boscovitch*, 20 Cal. 436; *Davis v. Byrd*, 94 Ind. 525; *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N. E. 35; *Davenport v. Ogg*, 15 Kan. 364; *Keith v. Wilson*, 6 Mo. 435; *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *State v. Salge*, 2 Nev. 321; *Dickson v. State*, 39 Ohio St. 73; *Hey v. Com.* 32 Gratt. 946, 34 Am. Rep. 799.

³*State v. Jones*, 47 La. Ann. 1524, 18 So. 515; *Gulf, C. & S. F. R. Co. v. Burleson* (Tex. Civ. App.) 26 S. W. 1107; *Woods v. McPheran*, Peck (Tenn.) 371.

⁴*Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767; *King v. State*, 34 Tex. Crim. App. 228, 29 S. W. 1086.

7. Limiting number of witnesses.

A reasonable limitation of the number of witnesses to be called to testify to a particular fact in a cause is within the discretion of the trial court,¹ but this discretion should not be so exercised as to place an arbitrary limit upon the number of witnesses who may be called to establish a vital issue,² nor to prevent a party from testifying in his own behalf.³

¹*Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Minthon v. Lewis*, 78 Iowa, 620, 43 N. W. 465; *Hupp v. Boring*, 8 Ohio C. C. 259; *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174.

This rule applies to experts. *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 548, 34 N. E. 400; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Hilliard v. Beattie*, 59 N. H. 462; *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 671.

This discretion may be exercised after each party has called a number of witnesses to testify to such fact (*Larson v. Eau Claire*, 92 Wis. 86, 65 N. W. 731; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058), but not after the permitted number of witnesses has been examined by one of the parties. *Green v. Phoenix Mut. L. Ins. Co.* 134 Ill. 310, 10 L. R. A. 576, 25 N. E. 583.

It is not an abuse of discretion to limit the witnesses of each party upon the value of real property to five (*Everett v. Union P. R. Co.* 59 Iowa, 243, 13 N. W. 109), or six (*Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705; *State ex rel. Barrett v. Pratt County Comrs.* 42 Kan. 641, 22 Pac. 722), or to eleven witnesses upon the question of damages (*Union R. Transfer & Stock-Yard Co. v. Moore*, 80 Ind. 458); nor to five witnesses upon the character of a witness sought to be impeached (*State v. Beabout*, 100 Iowa, 155, 69 N. W. 429). But it is error to limit to three witnesses defendant's evidence as to plaintiff's reputation set up in mitigation of damages in an action for slander of chastity. *Nelson v. Wallace*, 57 Mo. App. 397. And it is error to enforce a rule made before any testimony is introduced, limiting the number of witnesses offered to impeach or sustain the character of the parties to six on each side. *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

¹*Green v. Phoenix Mut. L. Ins. Co.* 134 Ill. 310, 10 L. R. A. 576, 25 N. E. 583; *White v. Hermann*, 51 Ill. 243; *Hubble v. Osborn*, 31 Ind. 249; *Reynolds v. Port Jervis Boot & Shoe Factory*, 32 Hun, 64.

²*Fisher v. Conway*, 21 Kan. 18, 31 Am. Rep. 419.

8. Privilege of witnesses.

It is the privilege of a witness to refuse to answer any question where his answer will expose him to a criminal charge,¹ or will subject him to a penalty or forfeiture,² or will furnish an essential link in the chain of evidence establishing his liability.³ The privilege extends to protection from a disclosure of a trade secret the effect of which might ruin the business of the witness,⁴ but will not sustain him in his refusal to answer a question because his answer will expose him to a civil suit or liability;⁵ nor because his answer will degrade or disgrace him, unless the evidence sought is immaterial to the issue.⁶

The privilege is personal to the witness⁷ unless the question is not pertinent,⁸ and may be waived by him,⁹ and a party cannot avail himself of the court's erroneous refusal to allow it.¹⁰ A witness cannot claim his privilege as an excuse for his refusal to be sworn, but can only avail himself of it when the objectionable question is asked.¹¹

The court may properly instruct the witness as to his privilege where he appears in need of such instruction,¹² and it may even be his duty to do so.¹³

¹*Burger v. State*, 83 Ala. 36, 3 So. 319; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230; *Grannis v. Branden*, 5 Day, 260, 5 Am. Dec. 143; *Short v.*

State, 4 Harr. (Del.) 568; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316; *Re Nickell*, 47 Kan. 734, 28 Pac. 1076; *State v. Crittenden*, 38 La. Ann. 448; *Simmons v. Holster*, 13 Minn. 249, Gil. 232; *State v. Albert*, 73 Mo. 357; *Southard v. Rexford*, 6 Cow. 254; *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52; *Reed v. Williams*, 5 Sneed, 580, 73 Am. Dec. 157; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *United States v. Moses*, 1 Cranch, C. C. 170, Fed. Cas. No. 15,824.

That the witness will be subjected to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection, see note to *Cooper v. State* (Ala.) 4 L. R. A. 766.

It is not necessary that the witness claim his privilege, where the question is so framed that a responsive answer *prima facie* tends to criminate him. *Alston v. State*, 109 Ala. 51, 20 So. 81.

**Henry v. Bank of Salina*, 1 N. Y. 83; *Johnson v. Donaldson*, 18 Blatchf. 287; *Com. v. Willard*, 22 Pick. 476; *Poindexter v. Davis*, 6 Gratt. 481.

**Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Printz v. Cheeney*, 11 Iowa, 469; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. 229; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196.

That a witness may refuse an answer to every incidental fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture, see note to *Rice v. Rice* (N. J. Eq.) 11 L. R. A. 591.

*Plaintiff in an action to restrain the use of his trademark will not be compelled to disclose the ingredients of his manufactures, although the answer alleges the product to be injurious. *Tetlow v. Savournin*, 15 Phila. 170, cited with approval in *Moxie Nerve Food Co. v. Beach*, 35 Fed. Rep. 465. In *Burnett v. Phalon*, 21 How. Pr. 100, a question calling for the ingredients of a manufactured article was allowed on cross-examination, on the ground that the examination in chief had opened the subject.

**Com. v. Thurston*, 7 J. J. Marsh. 62; *Hays v. Richardson*, 1 Gill & J. 366; *Lowney v. Parham*, 20 Me. 235; *Bull v. Loveland*, 10 Pick. 9; *Copp v. Upham*, 3 N. H. 159; *Re Kip*, 1 Paige, 601; *Harper v. Burrow*, 6 Ired. Law, 30; *Baird v. Cochran*, 4 Serg. & R. 397; *Zollicoffer v. Turney*, 6 Yerg. 297; *Ward v. Sharp*, 15 Vt. 115. *Contra*, *Benjamin v. Hathaway*, 3 Conn. 528; *Starr v. Tracey*, 2 Root, 528; *Storrs v. Wetmore*, Kirby, 203.

**Ex parte Rowe*, 7 Cal. 184; *Weldon v. Burch*, 12 Ill. 374; *South Bend v. Hardy*, 98 Ind. 577; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498; *McCampbell v. McCampbell*, 20 Ky. L. Rep. 552, 46 S. W. 18; *Jennings v. Prentice*, 39 Mich. 421; *Clementine v. State*, 14 Mo. 112; *Lohman v. People*, 1 N. Y. 385, 49 Am. Dec. 340; *Conway v. Clinton*, 1 Utah, 215; *Howel v. Com.* 5 Gratt. 664; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644. *Contra*, *Taylor v. State*, 83 Ga. 647, 10 S. E. 442; *Vaughn v. Perine*, 3 N. J. L. 728; *Respublica v. Gibbs*, 3 Yeates, 429.

Under a Code provision excusing a witness from answers which will expose him to public ignominy it must reasonably appear, not only that they would disclose acts which might justify public censure, but those which would tend to expose him to public hatred or detestation or dishonor. *Mahanke v. Cleland*, 76 Iowa, 401, 41 N. W. 53.

In Texas the irrelevancy of the question does not justify the refusal of the witness to answer. *Crockett v. State* (Tex. Crim. App.) 49 S. W. 392.

¹*Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 697; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *Mitchell v. Com.* 12 Ky. L. Rep. 458, 14 S. W. 489; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Roddy v. Finnegan*, 43 Md. 490; *Com. v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52; *Southard v. Rexford*, 6 Cow. 254; *State v. Butler*, 47 S. C. 25, 24 S. E. 991; *San Antonio Street R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Morgan v. Halberstadt*, 20 U. S. App. 417, 60 Fed. Rep. 592, 9 C. C. A. 147.

The privilege may be claimed by counsel where the witness is a party. *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316; *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183. *Contra, State v. Kent*, 5 N. D. 516, *sub nom. State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052.

²*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *South Bend v. Hardy*, 98 Ind. 583, 49 Am. Rep. 792.

³A witness who discloses part of the transaction with which he was criminally concerned, without claiming his privilege, must disclose the whole. *People v. Freshour*, 55 Cal. 375; *State v. Fay*, 43 Iowa, 651; *Norfolk v. Gaylord*, 28 Conn. 309; *Com. v. Pratt*, 126 Mass. 462; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Foster v. People*, 18 Mich. 276; *Lockett v. State*, 63 Ala. 5; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *State v. Hall*, 20 Mo. App. 397; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356. But he does not thereby waive his privilege of refusing to reveal other unlawful acts wholly unconnected with the one of which he has spoken, even though they may be material to the issue. *Low v. Mitchell*, 18 Me. 372; *Evans v. O'Connor* (Mass.) 54 N. E. 557.

A waiver must be knowingly and understandingly made, and no advantage be taken of the witness's ignorance. *United States v. Bell*, 81 Fed. Rep. 830; *Emery v. State*, 101 Wis. 627, 78 N. W. 145; *Coburn v. Odell*, 30 N. H. 540.

A waiver is not binding upon the witness on a subsequent trial. *Georgia R. & Bkg. Co. v. Lybren*, 99 Ga. 421, 27 S. E. 794; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. And a disclosure made long before the trial cannot be relied upon as a waiver. *Samuel v. People*, 164 Ill. 379, 45 N. E. 728.

⁴*Clark v. Reese*, 35 Cal. 89; *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *Cloyes v. Thayer*, 3 Hill, 564; *Morgan v. Halberstadt*, 20 U. S. App. 417, 60 Fed. Rep. 592, 9 C. C. A. 147. *Dictum* to the contrary in *Com. v.*

Kimball, 24 Pick. 366, 35 Am. Dec. 326; *State ex rel. Hopkins v. Olin*, 23 Wis. 309.

¹¹*Ex parte Stice*, 70 Cal. 51, 11 Pac. 459; *Re Eckstein*, 148 Pa. 509, 24 Atl. 63. *Contra*, *Neale v. Coningham*, 1 Cranch, C. C. 76, Fed. Cas. No. 10,067.

¹²*Emery v. State*, 101 Wis. 627, 78 N. W. 145.

¹³*Friess v. New York C. & H. R. R. Co.* 67 Hun, 205, 22 N. Y. Supp. 104; *Lca v. Henderson*, 1 Coldw. 146.

The court is not bound to so instruct a witness upon the interposition of a party and independently of any objection taken by the witness himself. *Com. v. Shaw*, 4 Cush. 594.

9. — when protected from effect of disclosure.

A witness cannot claim his privilege where the prosecution to which his answers will expose him is barred by the statute of limitations;¹ nor where he has been pardoned,² or acquitted³ of the offense. But neither a promise of the attorney general not to prosecute,⁴ nor an equitable right to executive pardon,⁵ if the witness states fully and fairly the truth, will deprive him of his privilege.

Several courts of last resort have decided that no statute can deprive a witness of his constitutional privilege unless it affords absolute immunity from prosecution for the offense to which the incriminating question relates.⁶ But there is equally high authority for the proposition that the privilege may be lawfully denied where the subsequent use of his testimony against the witness is prohibited.⁷

¹*Calhoun v. Thompson*, 56 Ala. 166, 28 Am. Rep. 754; *Weldon v. Burch*, 12 Ill. 374; *Mahanke v. Cleland*, 76 Iowa, 401, 41 N. W. 53; *Close v. Olney*, 1 Denio, 319; *State v. Wharton* (Tenn.) 3 S. W. 490; *Floyd v. State*, 7 Tex. 215; *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532. *Contra*, *McFadden v. Reynolds* (Pa.) 11 Atl. 638.

But it must affirmatively appear that no prosecution is pending against the witness. *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Southern Railway News Co. v. Russell*, 91 Ga. 808, 18 S. E. 40.

²*Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644.

³*Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

⁴*Muller v. State*, 11 Lea, 18.

⁵*Ex parte Irvine*, 74 Fed. Rep. 954.

⁶*Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Cullen v. Com.* 24 Gratt. 624; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230.

A statute affording such complete immunity will deprive the witness of his privilege. *State v. Nowell*, 58 N. H. 314; *People v. Sharp*, 107 N. Y.

427, 14 N. E. 319; *Floyd v. State*, 7 Tex. 215; *Kendrick v. Com.* 78 Va. 493; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644; *Ex parte Cohen*, 104 Cal. 524, 26 L. R. A. 423, 38 Pac. 364.

¹*State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153; *Re Buskett*, 106 Mo. 602, 14 L. R. A. 407, 17 S. W. 753; *People ex rel. Hackley v. Kelley*, 24 N. Y. 74; *La Fontaine, v. Southern Underwriters Asso.* 83 N. C. 132.

For the effect of statutes prohibiting the use of testimony against the witness, see notes to *Re Buskett* (Mo.) 14 L. R. A. 407, and *United States v. James* (C. C. N. D. Ill.) 26 L. R. A. 418.

10. — question for court.

Whether any direct answer to the question can reasonably have a tendency to incriminate the witness is a question to be determined by the court from all the circumstances of the case,¹ and the sworn statement of the witness that such will be the fact is not conclusive.² The danger to be apprehended must be real and appreciable,³ but the privilege should be recognized and protected where it is not clearly manifest that the answer called for can have no incriminating tendency.⁴ The witness must be the judge of the effect of the particular answer which he must give,⁵ and cannot be compelled to show how this effect is produced, since such a course would render his privilege valueless.⁶

¹*Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Janvrin v. Scammon*, 29 N. H. 280; *Ex parte Irvine*, 74 Fed. Rep. 954; *Com. v. Bell*, 145 Pa. 374, 22 Atl. 641, 644; *Mahanke v. Cleland*, 76 Iowa, 401, 41 N. W. 53; *Kirschner v. State*, 9 Wis. 140.

The party calling the witness may show by other testimony that the answer cannot possibly criminally implicate him. *Ford v. State ex rel. Hilton*, 29 Ind. 541, 91 Am. Dec. 658.

²*State v. Duffy*, 15 Iowa, 425.

The court should not in such a case compel the witness to testify unless it clearly appears that he is mistaken. *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Temple v. Com.* 75 Va. 892.

³*State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Queen v. Boyes*, 1 Best & S. 327.

⁴*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Janvrin v. Scammon*, 29 N. H. 280.

⁵*Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *Richman v. State*, 2 G. Greene, 532; *Kirschner v. State*, 9 Wis. 140; *Com. v. Braynard*, Thacher, C. C. 146; *Warner v. Lucas*, 10 Ohio, 336.

⁶*Ex parte Irvine*, 74 Fed. Rep. 954; *Merluzzi v. Gleeson*, 59 Md. 214; *People v. Mather*, 4 Wend. 229; *Janvrin v. Scammon*, 29 N. H. 280; *Kirschner v. State*, 9 Wis. 140.

11. Expert's refusal to testify unless specially compensated.

It has been held that a physician or surgeon cannot be compelled to testify as an expert unless specially compensated.¹ But the weight of authority is to the effect that, while he cannot be compelled to make any preliminary preparation without extra compensation, he cannot for that reason refuse to give such information as he already possesses.²

¹*Webb v. Page*, 1 Car. & K. 23; *Buchman v. State*, 59 Ind. 1; *United States v. Howe*, 12 Cent. L. J. 193. *Dictum* to same effect in *People v. Montgomery*, 13 Abb. Pr. N. S. 207; *Re Roelker*, Sprague, 276, Fed. Cas. No. 11,995.

The effect of the decision in *Buchman v. State*, 59 Ind. 1, has been nullified in Indiana by a legislative enactment evidently intended to meet this decision. See Horner's Ind. Stat. 1896, § 504. And for an extended discussion of the compensation of expert witnesses, see note to *Flinn v. Prairie County* (Ark.) 27 L. R. A. 669. And as to the right of the state to require service of witnesses without compensation, see note to *Dixon v. People* (Ill.) 39 L. R. A. 116.

²*Ex parte Dement*, 53 Ala. 389; *Flinn v. Paririe County*, 60 Ark. 204, 27 L. R. A. 669, 29 S. W. 459; *Dixon v. People*, 168 Ill. 179, 39 L. R. A. 116, 48 N. E. 108; *State v. Teipner*, 36 Minn. 535, 32 N. W. 678; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573.

12. Questions generally.

Each question put to a witness need not be so comprehensive that the answer when taken alone shall be evidence of some issue in the cause. That the answer will be a link in the chain of proof is sufficient to render the question relevant.¹ The relevancy of preliminary questions need not be apparent when asked, where the answers lead up to or connect with testimony subsequently introduced.²

General questions touching a cause and the various issues involved are not objectionable,³ unless asked in such a general way that no intelligent answer can be given.⁴

A compound question, only a part of which is proper, may rightfully be excluded as a whole;⁵ and the court may, in its discretion, refuse to allow questions which are argumentative and apparently intended more to affect the jury by the form of the question than by the answer of the witness,⁶ or which are so skilfully framed as to call out certain facts and exclude others connected with the same transaction.⁷

The admission of a proper question is not error because the witness misunderstood it or gave an improper answer,⁸ and if no improper testimony is in fact given, the allowance of improper questions is immaterial.⁹

¹*Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Schuchardt v. Allen*, 1 Wall. 359, 17 L. ed. 642.

But to render a question, in itself apparently irrelevant, proper to be asked as a link in a chain of evidence, it must be accompanied with a proposal to follow it up at the proper time by proof of other facts, which, if true, will make the question relevant. *Wyngert v. Norton*, 4 Mich. 286.

²*State v. Kent*, 5 N. D. 516, *sub nom. State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052.

³*Mann v. State*, 23 Fla. 610, 3 So. 207; *Northern P. R. Co. v. Charles*, 7 U. S. App. 359, 51 Fed. Rep. 562, 2 C. C. A. 380; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644; *Hicks v. Riverside Fruit Co.* 72 Cal. 303, 13 Pac. 873; *Angell v. Rosenbury*, 12 Mich. 241.

⁴*Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

A question directing a witness to "state to the jury the various conversations which led up to the making of this contract" is properly rejected as too general. *Hinds v. Backus*, 45 Minn. 170, 47 N. W. 655.

⁵*George v. Norris*, 23 Ark. 121; *Wyman v. Gould*, 47 Me. 159; *Whiteford v. Burckmyer*, 1 Gill, 127, 39 Am. Dec. 640; *United States Sugar Refinery v. Providence Steam & Gas Pipe Co.* 18 U. S. App. 603, 62 Fed. Rep. 375, 10 C. C. A. 422.

⁶*State v. Leuth*, 5 Ohio C. C. 94.

⁷*Tyler v. Waddingham*, 58 Conn. 375, 8 L. R. A. 657, 20 Atl. 335.

⁸*Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

⁹*State v. Tippet*, 94 Iowa, 646, 63 N. W. 445; *Deane v. Denver & R. G. R. Co.* 77 Ill. App. 242; *Miller v. Cook*, 127 Ind. 339, 26 N. E. 1072; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619; *Kalbus v. Abbot*, 77 Wis. 621, 46 N. W. 810; *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628; *King v. Second Ave. R. Co.* 75 Hun, 17, 26 N. Y. Supp. 973.

13. — assuming facts not proved.

It is no objection to a question that it assumes facts as true which are not in dispute,¹ but a question which assumes the existence of a fact not shown by any evidence,² or which erroneously assumes a statement to have been made by the witness,³ is properly excluded. After a witness has testified positively to a fact there is no reason why counsel should not formulate questions to be propounded to him on the theory that his testimony already given is true.⁴

¹*Robinson v. Craver*, 88 Iowa, 381, 55 N. W. 492; *Willey v. Portsmouth*, 35 N. H. 303; *Hardcastle v. Heine*, 25 Misc. 146, 54 N. Y. Supp. 169; *Hays v. State* (Tex. Crim. App.) 20 S. W. 361.

²*Bushnell v. Simpson*, 119 Cal. 658, 51 Pac. 1080; *Hine's Appeal*, 68 Conn. 551, 37 Atl. 384; *Chattanooga, R. & C. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848; *Carpenter v. Ambrosion*, 20 Ill. 172; *Pennsylvania Co. v.*

Newmeyer, 129 Ind. 401, 28 N. E. 860; *Baltimore & O. R. Co. v. Thompson*, 10 Md. 76; *People v. Lange*, 90 Mich. 454, 51 N. W. 534; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747; *People v. Mather*, 4 Wend. 229; *Klock v. State*, 60 Wis. 574, 19 N. W. 543.

A question which assumes a fact may be allowed when asked for the sole purpose of calling a witness's attention to the subject of his testimony. *Boothby v. Brown*, 40 Iowa, 104.

People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; *Fengar v. Brown*, 57 Conn. 60, 17 Atl. 321; *Sanderlin v. Sanderlin*, 24 Ga. 583; *People v. Brow*, 90 Hun, 509, 35 N. Y. Supp. 1009.

Barndt v. Frederick, 78 Wis. 1, 11 L. R. A. 199, 47 N. W. 6.

14. — calling for expert opinions.

While some discretion as to the form of questions to be asked of an expert witness on direct examination¹ is confided to the trial judge,² any question being proper which will elicit an opinion as to the matter of skill or science in controversy, and at the same time exclude any opinion as to the effect of the evidence in establishing controverted facts,³ such questions must be framed hypothetically unless the facts are admitted or undisputed, or the witness is personally acquainted with them.⁴

It is generally deemed improper to request an expert to give his opinion based upon his recollection of the testimony without incorporating the testimony in the question,⁵—especially if the evidence is conflicting.⁶ But where the evidence is brief, clear, and uncontroverted it is not improper to require the expert to give his opinion based on the assumption that such evidence is true.⁷ And where a witness testifies to the particular facts on which the expert, who follows the witness while the facts are fresh in the minds of the jury, is to base his opinion, these facts need not be again stated in the question unless there is doubt whether they were understood.⁸

¹For cross-examination of experts, see *infra*, § 25.

²*Roraback v. Pennsylvania Co.* 58 Conn. 292, 20 Atl. 465.

³*Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697.

⁴*Craig v. Noblesville & S. C. Gravel Road Co.* 98 Ind. 109; *Chicago & A. R. Co. v. Glenny*, 175 Ill. 238, 51 N. E. 896; *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

When the facts are admitted or undisputed the witness may be asked as to the conclusions to be drawn from them. *M'Naghten's Case*, 10 Clark & F. 200; *Coyle v. Com.* 104 Pa. 117; *Fort Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742; *Page v. State*, 61 Ala. 16; *State v. Klinger*, 46 Mo. 224.

The question need not be framed hypothetically where the witness is personally acquainted with the facts. *Brown v. Huffard*, 69 Mo. 305; *Bellfontaine & I. R. Co. v. Bailey*, 11 Ohio St. 333; *Mercer v. Vose*, 67 N. Y. 56; *Niendorff v. Manhattan R. Co.* 4 App. Div. 46, 38 N. Y. Supp. 690; *Boardman v. Woodman*, 47 N. H. 120. But the witness must state to the jury all the facts within his own knowledge upon which his opinion is based. *Burns v. Barenfield*, 84 Ind. 43; *Dickinson v. Barber*, 9 Mass. 227, 6 Am. Dec. 58; *Hitchcock v. Burgett*, 38 Mich. 501; *People v. Strait*, 148 N. Y. 566, 42 N. E. 1045.

*The only safe rule in allowing an expert witness to give his opinion based upon testimony of others is to require the assumed facts upon which the opinion is desired to be stated hypothetically. *Craig v. Noblesville & S. C. Gravel Road Co.* 98 Ind. 109; *Stoddard v. Winchester*, 157 Mass. 567, 32 N. E. 948; *Reed v. State*, 62 Miss. 405; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696; *State v. Bowman*, 78 N. C. 509; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73. *Contra*, dictum in *Polk v. State*, 36 Ark. 117; *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983; *Jones v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 279, 45 N. W. 444. But these as well as the following cases, which seem to announce a contrary rule, are generally distinguishable on the ground that there was no conflict of evidence. *State v. Windsor*, 5 Harr. (Del.) 513; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Negroes Jerry v. Townshend*, 9 Md. 145; *Gretchell v. Hill*, 21 Minn. 464; *Gilman v. Strafford*, 50 Vt. 723; *Wright v. Hardy*, 22 Wis. 348.

*An expert cannot be asked to give his opinion based upon conflicting testimony. *Gunter v. State*, 83 Ala. 96, 3 So. 600; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Bishop v. Spining*, 38 Ind. 143; *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678; *Allen v. Union P. R. Co.* 7 Utah, 239, 26 Pac. 297; *Livingston v. Com.* 14 Gratt. 592; *Luning v. State*, 2 Pinney, 215, 5 Am. Dec. 153. Even though the question assumes the truth of the entire evidence. *Smith v. Hickenbottom*, 57 Iowa, 733, 11 N. W. 664; *Woodbury v. Obear*, 7 Gray, 467; *Kempsey v. McGinniss*, 21 Mich. 123; *Coyle v. Com.* 104 Pa. 117.

**Atchison, T. & S. F. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814; *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697; *Yardley v. Cuthbertson*, 108 Pa. 395, 1 Atl. 765; *State v. Hayden*, 51 Vt. 296; *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. 496.

An expert may be asked for his opinion based upon the testimony of a single witness upon a single subject, which he has heard and to which his attention has first been directed. *Seymour v. Fellows*, 77 N. Y. 178.

**State v. Watson*, 81 Iowa, 380, 46 N. W. 868.

15. Hypothetical questions.

The facts assumed in a hypothetical question as the basis for an expert opinion must have some support in the evidence.¹ The question need not embrace all the facts in evidence,² though it must not exclude

from the expert's consideration a material fact essential to an intelligent opinion.³

The question may be based upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed on certain facts which the evidence tends to establish,⁴ and, if within the probable or possible range of the evidence, is unobjectionable.⁵ Whether or not the facts assumed are true or are established by the evidence is for the jury to determine,⁶ and constitutes no available objection to the question.⁷

The question may be based in part upon the expert's personal examination and knowledge,⁸ but the opinions of other expert witnesses should not be incorporated in it.⁹

While long hypothetical questions which ask the witness to usurp the functions of the jury and involve many distinct facts and elements are objectionable,¹⁰ their length must necessarily depend upon the nature of the inquiry and the number of particulars which must be considered, and must rest largely in the discretion of the court.¹¹

¹*Bostic v. State*, 94 Ala. 45, 10 So. 602; *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130; *Kelly v. Perrault* (Idaho) 48 Pac. 45; *Haish v. Payson*, 107 Ill. 365; *Hurst v. Chicago, R. I. & P. R. Co.* 49 Iowa, 76; *Davis v. Traveler's Ins. Co.* 59 Kan. 74, 52 Pac. 67; *Fox v. Peninsular White Lead & Color Works*, 92 Mich. 243, 52 N. W. 623; *State v. Scott*, 41 Minn. 365, 43 N. W. 62; *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Burnett v. Wilmington, N. & N. R. Co.* 120 N. C. 517, 26 S. E. 819; *Williams v. Brown*, 28 Ohio St. 547; *State v. Anderson*, 10 Or. 448; *Reber v. Her-ring*, 115 Pa. 599, 8 Atl. 830; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Hypothetical questions are proper where they are directed to the effect of certain conditions, some of which, although not shown to exist in the particular case, are shown to be caused by the same general principles. *Kraatz v. Brush Electric Light Co.* 82 Mich. 457, 46 N. W. 787.

It is not reversible error to permit an expert witness to answer a hypothetical question assuming a fact unsupported by the evidence, where this fact was the only hypothesis of the question. *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252.

A hypothetical question cannot be based upon the assumption of the truth of extracts read by counsel from a medical treatise. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

²*People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Goodwin v. State*, 96 Ind. 550; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Coyle v. Com.* 104 Pa. 117; *Fort Worth & D. City R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

The reason is that if, in the opinion of counsel, there is other evidence proper for the witness to consider, his attention may be called to it on

cross-examination. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *Stearns v. Field*, 90 N. Y. 640; *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

If there is no dispute as to the facts on which the witness is to base his opinion, it is proper to require that the question shall embrace them all. *Davis v. State*, 35 Ind. 496. The question must fully and fairly reflect the facts (*Briggs v. Minneapolis Street R. Co.* 52 Minn. 36, 53 N. W. 1019; *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637; *Burgo v. State*, 26 Neb. 639, 42 N. W. 701; *Fisher v. Monroe*, 2 Misc. 326, 21 N. Y. Supp. 995), and the omission from the question of facts in evidence renders it improper where, by reason of such omission, it manifestly fails to present the facts which it does include in their just and true relation. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

**Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007; *Vosburg v. Putney*, 80 Wis. 523, 14 L. R. A. 226, 50 N. W. 403; *Western Assur. Co. v. J. H. Mohlman Co.* 51 U. S. App. 577, 83 Fed. Rep. 811, 40 L. R. A. 561, 28 C. C. A. 157.

**Gottlieb v. Hartman*, 3 Colo. 53; *Cole v. Fall Brook Coal Co.* 159 N. Y. 59, 53 N. E. 670.

In propounding hypothetical questions counsel may assume any state of facts which there is evidence tending to prove. *People v. Hill*, 116 Cal. 562, 48 Pac. 711; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Baker v. State*, 30 Fla. 41, 11 So. 492; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717; *Peterson v. Chicago, M. & St. P. R. Co.* 38 Minn. 511, 39 N. W. 485; *Smith v. Chicago & A. R. Co.* 119 Mo. 246, 23 S. W. 784; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Filer v. New York C. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 688, 8 S. E. 493; *Tebo v. Augusta*, 90 Wis. 405, 63 N. W. 1045; *Sigafus v. Porter*, 51 U. S. App. 693, 84 Fed. Rep. 430, 28 C. C. A. 443.

It is sufficient if the facts hypothecated be proved by some witness, although not proved to a certainty or with any degree of certainty. *Baxter v. Knox*, 19 Ky. L. Rep. 1973, 44 S. W. 972. But a party cannot, however, introduce contradictory evidence upon a given point, and base hypothetical questions upon the theory that some of the witnesses are correct and some mistaken. *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637.

**Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Powers v. Kansas City*, 56 Mo. App. 573; *Harnett v. Garvey*, 66 N. Y. 641.

**Gottlieb v. Hartman*, 3 Colo. 53; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Grand Lodge, I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59.

**Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458.

**Crawford v. Wolf*, 29 Iowa, 567; *Selleck v. Janesville*, 100 Wis. 157, 41 L. R. A. 563, 75 N. W. 975; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178; *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 322, 19 N. W. 17.

But a hypothetical case and personal examination cannot be joined in the same question, where the examination was, from the time it was made, little or no evidence of the point at issue. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

⁹*Louisville, N. A. & O. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Williams v. State*, 64 Md. 384, 1 Atl. 887.

¹⁰*Haish v. Munday*, 12 Ill. App. 539; *People v. Brown*, 53 Mich. 531, 19 N. W. 172.

¹¹*Forsyth v. Doolittle*, 120 U. S. 73, 30 L. ed. 586, 7 Sup. Ct. Rep. 408.

16. Leading questions.

A leading question is one which suggests to the witness the answer expected or desired.¹ That the question may be answered by "Yes" or "No" is not necessarily decisive of its leading character.² But it has been held that a question which embodies a material fact and admits of a conclusive affirmative or negative answer is open to that objection.³ And it is sometimes said that a question which assumes the existence of facts material to the issue is leading.⁴ A question which is suggestive of the answer is none the less leading because propounded in the alternative form.⁵

Introductory questions which are designed to lead the witness with the more expedition to the subject upon which he is desired to give his testimony are not objectionable;⁶ nor are those which, though in appearance leading, are necessarily so because of the nature of the inquiry.⁷

Objections to questions as leading are addressed to the discretion of the trial court;⁸ and the exercise of this discretion is not revisable on appeal⁹ except for manifest abuse.¹⁰

The allowance of a leading question is not ground for reversal where the facts embraced in it have been already,¹¹ or are subsequently, elicited by proper questions.¹²

¹*Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Harvey v. Osborn*, 55 Ind. 535; *Stoudt v. Shepherd*, 73 Mich. 588, 44 N. W. 696; *Safford v. Horne*, 72 Miss. 470, 18 So. 433; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926; *Page v. Parker*, 40 N. H. 47; *Trammell v. McDade*, 29 Tex. 360; *Proper v. State*, 85 Wis. 626, 55 N. W. 1035.

²A question which merely suggests the subject, and not the answer, is not leading. *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089.

³A question is not objectionable as leading because it can be answered by "Yes" or "No," unless it also suggests the desired answer. *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Schlesinger v. Rogers*, 80 Ill. App. 420; *Woolheather v. Risley*, 38 Iowa, 486; *McKcown v. Harvey*, 40 Mich. 226;

- Lott v. King*, 79 Tex. 292, 15 S. W. 231. But the question is leading when capable of eliciting by such an answer more than one simple proposition. *International & G. N. R. Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 500. And if the answer "Yes" or "No" will be conclusive the question is objectionable as leading. *Nicholls v. Dowding*, 1 Stark. 81; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926.
- **Turney v. State*, 8 Smedes & M. 104, 47 Am. Dec. 74; *United States v. Angell*, 11 Fed. Rep. 34.
- **Chattanooga, R. & C. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848; *Klock v. State*, 60 Wis. 574, 19 N. W. 543.
- **State v. Johnson*, 29 La. Ann. 717; *Parsons v. Huff*, 38 Me. 137; *Bartlett v. Hoyt*, 33 N. H. 151; *People v. Mather*, 4 Wend. 229; *Hopkinson v. Steel*, 12 Vt. 582.
- **Williams v. Jarrot*, 6 Ill. 120; *Lowe v. Lowe*, 40 Iowa, 220; *State v. Walsh*, 44 La. Ann. 1122, 11 So. 811; *People v. Mather*, 4 Wend. 229; *Hausenfluck v. Com.* 85 Va. 702, 8 S. E. 683; *De Haven v. De Haven*, 77 Ind. 236; *Gannon v. Stevens*, 13 Kan. 447.
- **Bullard v. Hascall*, 25 Mich. 132.
- **Harrison v. Yerby* (Ala.) 14 So. 321; *Wallace v. Dernheim*, 63 Ark. 108, 37 S. W. 712; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Cotton States L. Ins. Co. v. Edward's*, 74 Ga. 220; *Crean v. Houmigan*, 158 Ill. 301, 4 N. E. 880; *Kyle v. Miller*, 108 Ind. 90, 8 N. E. 721; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498; *State v. Spidel*, 42 Kan. 441, 22 Pac. 620; *Webb v. Feathers* (Mich.) 78 N. W. 550; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Whitman v. Morey*, 63 N. H. 448, 2 Al. 899; *Ellison v. Beannabia*, 4 Okla. 347, 46 Pac. 477; *State v. Chee Gong*, 17 Or. 635, 21 Pac. 882; *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375.
- **Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 18 So. 659; *Stratford v. Sanford*, 9 Conn. 279; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Parsons v. Huff*, 38 Me. 137; *York v. Pease*, 2 Gray, 282; *St. Louis & I. M. R. Co. v. Silver*, 56 Mo. 265; *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 37 Atl. 730; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854; *Farmers' Mut. F. Ins. Co. v. Bair*, 87 Pa. 124; *Hopkinson v. Steel*, 12 Vt. 582.
- The rule seems the same in New York. *Walker v. Dunsbaugh*, 20 N. Y. 170; *Downs v. New York C. R. Co.* 47 N. Y. 83; *Brooker v. Filkins*, 9 Misc. 146, 29 N. Y. 68; *King v. Second Ave. R. Co.* 75 Hun, 17, 26 N. Y. Supp. 973. But the discretion is said to be revisable for abuse in *Budlong v. Van Nostrand*, 24 Barb. 25; *Cope v. Sibley*, 12 Barb. 521; *Van Doren v. Jelliffe*, 1 Misc. 354, 26 N. Y. Supp. 636.
- ¹⁰*White v. White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; *Parker v. Georgia P. R. Co.* 83 Ga. 539, 10 S. E. 233; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166, Affirming 55 Ill. App. 124; *Goudy v. Werbe*, 117 Ind. 154, 3 L. R. A. 114, 19 N. E. 764; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498; *Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440; *Bellows v. Crane Lumber Co.* (Mich.) 5 Det. L. N. 871, 78 N. W. 536; *Turney v. State*, 8 Smedes & M. 104, 47 Am. Dec. 74; *Harvard v. Stiles*, 54 Neb. 26, 74 N. W. 399;

Bundy v. Hyde, 50 N. H. 116; *Deveau v. Clemens*, 17 Ohio C. C. 33; *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 598, 29 Atl. 300; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 533, 31 S. E. 392; *International & G. N. R. Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 500; *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568; *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840.

¹¹*People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Tift v. Jones*, 77 Ga. 181, 3 S. E. 399; *Hess v. Com.* (Ky.) 5 S. W. 751; *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272; *Washington, A. & Mt. V. Electric R. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391.

¹²*Mucci v. Houghton*, 89 Iowa, 608, 57 N. W. 305; *State v. Munson*, 7 Wash. 239, 34 Pac. 932.

As where elicited by the complaining party on cross-examination. *Fox v. Steever*, 156 Ill. 622, 40 N. E. 942; *Fire Asso. of Phila. v. Jones* (Tex. Civ. App.) 40 S. W. 44.

17. — to one's own witness.

While leading questions to one's own witness are generally objectionable, the trial judge may in his discretion permit such questions to be put on direct or redirect examination to a witness whose answers have taken by surprise the party calling him¹ or where the witness is hostile² or reluctant³ or so youthful,⁴ ignorant,⁵ or infirm⁶ as to require his attention to be led, or where his memory has been exhausted without stating some particular which cannot be significantly pointed to by a general inquiry.⁷

By the weight of authority leading questions may be asked a witness who is called to impeach another witness by contradiction;⁸ but there are decisions declaring that there is no reason for relaxing the general rule in favor of an impeaching witness.⁹

¹*St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

²*State v. Stevens*, 65 Conn. 93, 31 Atl. 496; *Rosenthal v. Bilger*, 86 Iowa, 246, 53 N. W. 255; *Meixsell v. Feezor*, 43 Ill. App. 180; *McBride v. Wallace*, 62 Mich. 451, 29 N. W. 75; *Severance v. Carr*, 43 N. H. 65; *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542.

The witness cannot be deemed hostile merely because he states that he does not remember having made a certain statement, where he has not testified to anything prejudicial to, and has manifested no bias against, the party calling him, and the latter makes no further effort to refresh his memory. *Fisher v. Hart*, 149 Pa. 232, 24 Atl. 225.

³*Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Severance v. Carr*, 43 N. H. 65; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Robinson v. State* (Tex. Crim. App.) 49 S. W. 386; *Schuster v. State*, 80 Wis. 107, 49 N. W. 30.

**Speckman v. Krieg*, 79 Mo. App. 376; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

**Doran v. Mullen*, 78 Ill. 342; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255.

**Belknap v. Stewart*, 38 Neb. 304, 56 N. W. 881; *Cheaney v. Arnold*, 18 Barb. 434.

**Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Huckins v. Peoples' Mut. F. Ins. Co.* 31 N. H. 238; *Hartsfield v. State* (Tex. Crim. App.) 20 S. W. 777; *Herring v. Skaggs*, 73 Ala. 446, 34 Am. Rep. 4.

A witness may sometimes be asked leading questions which direct his attention to a particular item concerning which he has testified generally. *Graves v. Merchants & B. Ins. Co.* 82 Iowa, 637, 49 N. W. 65.

But *People v. Mather*, 4 Wend. 229, holds that after a witness's memory as to a conversation has been exhausted he should not be asked a leading question directed to a particular portion of such conversation.

**Potter v. Bissell*, 3 Lans. 205; *Gunter v. Watson*, 49 N. C. (4 Jones L.) 455; *Norton v. Parsons*, 67 Vt. 526, 82 Atl. 481; *Rounds v. State*, 57 Wis. 45, 14 N. W. 865.

**Wood v. State*, 31 Fla. 221, 12 So. 539; *Allen v. State*, 28 Ga. 396; *Hallett Cousens*, 2 Moody & R. 238.

18. — on cross-examination.

Leading questions are generally permissible on cross-examination,¹ and the intervention of third parties adversely to both plaintiff and defendant does not change the rule.² The trial judge may in his discretion refuse to allow leading questions to be asked of a witness who shows a strong interest or bias in favor of the cross-examining party.³ And a party who extends his cross-examination of his adversary's witness beyond its strict limits cannot ask leading questions, unless the court in its discretion allows them; since the witness becomes in so far his own.⁴ Where there are two defendants, each making separate defenses or endeavoring to cast the fault upon the other, the court may disallow leading questions propounded upon cross-examination by one defendant to a witness for plaintiff when objected to by the other.⁵

¹*Phares v. Barber*, 61 Ill. 272; *Ferguson v. Rutherford*, 7 Nev. 390.

²*Townsend's Succession*, 40 La. Ann. 66, 3 So. 488.

**Rush v. French*, 1 Ariz. 99, 140, 25 Pac. 816; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

Even with an impartial witness under cross-examination the words cannot be put into the mouth of the witness to echo back again. *Clingman v. Irvine*, 40 Ill. App. 606.

**People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Ellmaker v. Buckley*, 16 Serg. & R. 72; *Harrison v. Rowan*, 3

Wash. C. C. 580, Fed. Cas. No. 6,141. *Contra, Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

In *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, the court says that leading questions may be put on cross-examination as to all matters pertinent to the party calling the witness except exclusively new matter, and that "nothing shall be deemed new matter except it be such as could not be given under a general denial."

**Mt. Adams & E. P. Inclined R. Co. v. Lowry*, 43 U. S. App. 408, 20 C. C. A. 596, 74 Fed. Rep. 463.

19. Answers.

While it is desirable that a witness be positive in his testimony, it is sufficient if he testifies to the best of his knowledge and belief, where he is unable to state the facts positively,¹ and, when required to narrate a previous conversation, he may give a general answer embodying its substance or purport if he cannot recollect the precise words used.² So, when undertaking to state from memory the testimony given by another witness on a former hearing, he may give its substance instead of the exact language,³ but he cannot give his impression unless it is made to appear that such impression is derived from his recollection,⁴ and he cannot state the impression left on his mind by a conversation of which he cannot recall even the substance.⁵

An answer is not necessarily objectionable as argumentative because the witness gives his reason for doing a particular thing, nor because it contains other than a statement of facts connected with the transaction in controversy.⁶

An answer must be responsive to the question,⁷ and any irresponsible statement will be struck out or the jury instructed to disregard it upon a motion seasonably made.⁸ A witness cannot be compelled to answer "yes" or "no" to a question which is not so worded as to make such an answer appropriate.⁹

¹*Rhode v. Louthain*, 8 Blackf. 413; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Swinney v. Booth*, 28 Tex. 113.

²*Seymour v. Harvey*, 11 Conn. 275; *Hope v. Machias Water Power & Mill Co.* 52 Me. 535; *Chambers v. Hill*, 34 Mich. 523; *Buchanan v. Atchison*, 39 Mo. 503; *Chaffee v. Cox*, 1 Hilt. 78.

³A witness may state what was an agreement between two parties, as he understood it from their conversation which he overheard, although he may not be able to give the terms used by the parties in making the agreement. *Eaton v. Rice*, 8 N. H. 378; *Moody v. Davis*, 10 Ga. 403, *dictum*.

⁴*Kittredge v. Russell*, 114 Mass. 67; *State v. Jones*, 29 S. C. 201, 7 S. E. 296.

⁵*Rounds v. McCormick*, 11 Ill. App. 220; *Clark v. Bigelow*, 16 Me. 246; *State v. Flanders*, 38 N. H. 324.

**Crews v. Threadgill*, 35 Ala. 334; *Helm v. Cantrell*, 59 Ill. 525; *Wilder v. Peabody*, 21 Hun, 376.

But a witness who states that he cannot give the language used in a conversation may testify to the impression received and the ideas formed therefrom. *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130.

**Burlington Gaslight Co. v. Greene*, 28 Iowa, 289.

**Baldwin v. Walker*, 91 Ala. 428, 8 So. 364; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Irlbeck v. Bierle*, 84 Iowa, 47, 50 N. W. 36; *Lazard v. Merchants' & M. Transp. Co.* 78 Md. 1, 26 Atl. 897; *Guild v. Aller*, 17 N. J. L. 310; *Ryan v. People*, 79 N. Y. 593; *Smith v. Northern P. R. Co.* 3 N. D. 555, 58 N. W. 345.

*See post, Division XII. § 2.

**Quinn v. O'Keeffe*, 9 App. Div. 68, 41 N. Y. Supp. 116; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

20. Use of scientific books on examination.

Although scientific and medical works are generally not competent evidence,¹ questions properly framed with a view to eliciting expert opinions are not objectionable because they are read from a standard medical treatise² or are drawn from an article in a medical journal by a physician of high standing;³ and quotations from medical works may be incorporated in questions used in catechising an expert as to his technical knowledge.⁴

An expert witness may refresh his recollection by reference to standard authorities prepared by persons of acknowledged ability, though the opinion which he gives must be his own, independent of that of the author,⁵ but he cannot be allowed to read from the work and thereupon testify what is included in it,⁶ nor can he read a paragraph therefrom with which he concurs in opinion.⁷ Nor can such works be resorted to in order to support the testimony of the witness,⁸ although a book which he has cited to sustain his own views may be used to discredit him,⁹ but not a book which he has not so cited.¹⁰

Reference to books of approved authority upon the subject under investigation is proper on cross-examination to test the learning of the witness.¹¹ But it is not error to refuse to allow a medical witness under cross-examination to be interrogated as to what is found in a medical treatise and then require him to find what he says is there.¹²

¹See post, Division XV. § 23; and for an extended discussion of scientific books and treatises as evidence, see note to *Union P. R. Co. v. Yates*, (C. C. A. 8th C.) 40 L. R. A. 553.

**Tompkins v. West*, 56 Conn. 478, 16 Atl. 237.

**State v. Coleman*, 20 S. C. 441.

**Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Williams v. Nally*, 20 Ky. L. Rep. 244, 45 S. W. 874.

**State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Huffman v. Click*, 77 N. C. 55.

**Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55.

**Com. v. Sturtivant*, 117 Mass. 123, 19 Am. Rep. 401.

But statistics of mechanical experiments and tabulations of the results thereof contained in a scientific work concededly recognized as a standard authority by engineers may be read in evidence by an expert witness in support of his professional opinion, where such statistics and tabulations are generally relied upon by experts in the particular field of the mechanical arts with which such statistics and tabulations are concerned. *Western Assur. Co. v. J. H. Mohlman Co.* 51 U. S. App. 577, 83 Fed. Rep. 811, 40 L. R. A. 561, 28 C. C. A. 157.

**Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091; *Louisville, N. A. & C. R. Co. v. Howell*, 147 Ind. 266, 45 N. E. 584.

**Bloomington v. Shrock*, 110 Ill. 219; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *Huffman v. Click*, 77 N. C. 55; *Ripon v. Bittel*, 30 Wis. 614; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 6 Pac. 869.

**People v. Goldenson*, 69 Cal. 328, 19 Pac. 161; *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198; *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28; *Knoll v. State*, 55 Wis. 249, 3 Am. Rep. 26, 12 N. W. 369.

**Hess v. Lowery*, 122 Ind. 235, 7 L. R. A. 90, 23 N. E. 156; *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *State v. Wood*, 53 N. H. 484; *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128; *Egan v. Dry Dock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 188; *Brownell v. Black*, 31 N. B. 594.

But questions as to extracts from such works should be strictly limited to the one purpose of testing his competency as an expert and the value of his opinion. *Fisher v. Southern P. R. Co.* 89 Cal. 399, 26 Pac. 894; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679. And counsel cannot on cross-examination call the attention of the witness to medical authorities and read extensively therefrom to the jury. *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

¹²*Davis v. State*, 38 Md. 15.

21. Use of memoranda to refresh recollection.

A witness may refresh and assist his memory by the use of a memorandum made at or near the time to which it relates,¹ and may even be required to do so.² It does not seem to be necessary that the writing should be made by the witness himself, provided that after inspecting it he can speak to the facts from his own recollection,³ or because of his confidence in the correctness of the memorandum.⁴ But it cannot be so used where the witness neither recollects the facts nor remembers to have recognized the writing as true, since his testimony, so far as founded upon such a writing, is but hearsay.⁵

The writing need not be an original where the witness, after his memory has been refreshed thereby, can testify from his own recollection of the original facts⁶ and can state that the original was a correct statement of the facts and that the writing used is a true copy.⁷ Whether in such case the original must first be accounted for is not free from doubt,⁸ but that the memorandum used is inadmissible in evidence is no objection to its use to refresh the memory.⁹ Nor need the witness have an independent recollection of the facts where he can state that at the time the memorandum was made he knew its contents and knew them to be correct.¹⁰

Anything used in court to refresh the memory of a witness adverse counsel may see and cross-examine upon,¹¹ but memoranda which were consulted out of court need not be produced for inspection,¹² unless the witness testifies upon the faith of the papers which he has inspected, and not from his own memory refreshed or confirmed by the examination.¹³ The manner in which such memoranda may be used must be left to some extent to the discretion of the court, and where they are voluminous he may be permitted to refer to them whenever necessary and will not be required to examine them all before testifying.¹⁴ Where the witness can neither read nor write, a memorandum signed with his mark cannot be read to him in the presence of the jury, but he must withdraw for that purpose.¹⁵

Surprise at unexpectedly adverse testimony has been held by the courts of last resort of several states to justify counsel in calling the attention of the witness to his previous testimony, deposition, or affidavit for the purpose of refreshing his recollection,¹⁶ but in other states such a course is not permitted,¹⁷ and the doctrine has been vigorously assailed by the Supreme Court of the United States as an unwarranted violation of the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing.¹⁸ But where the witness has been cross-examined as to what he stated in a deposition he may unquestionably be permitted to refresh his recollection from the deposition.¹⁹

¹*Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Rohrig v. Pearson*, 15 Colo. 127, 24 Pac. 1083; *Adams v. Internal Improvement Fund*, 37 Fla. 266, 20 So. 266; *Brown v. Galesburg Pressed Brick & Tile Co.* 132 Ill. 648, 24 N. E. 522; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Atchison, T. & F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781; *Wise v. Phoenix F. Ins. Co.* 101 N. Y. 637, 4 N. E. 634; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Kahn v. Traders Ins. Co.* 4 Wyo. 419, 34 Pac. 1059; *Flint v. Kennedy*, 33 Fed. Rep. 820.

In California by a Code provision a witness may refresh his recollection by

anything written under his direction at the time when the fact occurred, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418.

Refusal to permit a witness to refresh his recollection from memoranda is not erroneous where it is not shown by his own testimony that his memory needs the aid of such writings to refresh it. *Hayden v. Hoxie*, 27 Ill. App. 533; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Young v. Catlett*, 6 Duer, 437. Memorandum cannot be used unless made at or shortly after the time of the transaction and while the facts must have been fresh in his memory. *Howell v. Carden*, 99 Ala. 100, 10 So. 640; *Swartz v. Chickering*, 58 Md. 291; *Schuyler Nat. Bank v. Bullong*, 24 Neb. 825, 40 N. W. 413; *Ballard v. Ballard*, 5 Rich. L. 495; *Bergman v. Shoudy*, 9 Wash. 331, 37 Pac. 453; *Maxwell v. Wilkinson*, 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691.

Where the original memorandum was made in time it is immaterial when the copy was made if it sufficiently appears to be a true copy. *Lawson v. Glass*, 6 Colo. 134.

A memorandum of items of work done on a building, prepared by the witness from an inspection of the premises, may be used to refresh recollection, although not made until long after the work was done. *Ahern v. Boyce*, 26 Mo. App. 558. And see *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5, in which a witness in an action on a policy of fire insurance was allowed to use a list of goods made by him from recollection a short time before the trial. It is no objection that the memorandum is written in characters which the witness alone can read. *State v. Cardoza*, 11 S. C. 195, 238.

**Chapin v. Lapham*, 20 Pick. 467; *State v. Staton*, 114 N. C. 813, 19 S. E. 96.

**State v. Lull*, 37 Me. 246; *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102; *Huckins v. Peoples' Mut. F. Ins. Co.* 31 N. H. 238; *Huff v. Bennett*, 6 N. Y. 337; *State v. Finley*, 118 N. C. 1161, 24 S. E. 495; *Springs v. South Bound R. Co.* 46 S. C. 104, 24 S. E. 166; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376; *Hill v. State*, 17 Wis. 675.

**Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602; *Card v. Foot*, 56 Conn. 369, 15 Atl. 371; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077; *Coffin v. Vincent*, 12 Cush. 98; *Third Nat. Bank v. Owen*, 101 Mo. 558, 14 S. W. 632; *Crystal Ice Mfg. Co. v. San Antonio Brewing Asso.* (Tex. Civ. App.) 27 S. W. 210.

A witness may consult price lists to refresh his memory as to the price of certain articles therein listed, where such lists are recognized as authoritative and the items are too numerous to be carried in the memory. *Morris v. Columbian Iron Works & Dry Dock Co.* 76 Md. 354, 17 L. R. A. 851, 25 Atl. 417. And a witness testifying to the contents of an excursion railroad ticket may refer to a single trip ticket to refresh his memory, where he testifies that their conditions were identical in all respects save one relating exclusively to the use of the return coupon *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 300.

**Orr v. Farmers' Alliance Warehouse & Commission Co.* 97 Ga. 241, 22 S. E. 937; *Chamberlain v. Sands*, 27 Me. 458; *Green v. Caulk*, 16 Md. 556;

Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827; *Fritz v. Burris*, 41 S. C. 149, 19 S. E. 304; *Steele v. Wisner*, 141 Pa. 63, 21 Atl. 527; *Tingley v. Fairhaven Land Co.* 9 Wash. 34, 36 Pac. 1098.

Accounts of sales rendered by a commission merchant cannot be used by the owner to refresh his recollection where he has no personal knowledge of the facts except that afforded by the accounts themselves. *Gulf, C. & S. F. R. Co. v. Frost* (Tex. Civ. App.) 34 S. W. 167. Otherwise where the witness has an independent recollection of the main facts of the transaction and the account of sales is used only to refresh his memory as to the details. *Western U. Teleg. Co. v. Collins*, 7 Kan. App. 97, 53 Pac. 74.

**Lawson v. Glass*, 6 Colo. 134; *Finch v. Barclay*, 87 Ga. 393, 13 S. E. 566; *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250; *Bullock v. Hunter*, 44 Md. 416; *Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505; *George v. Joy*, 19 N. H. 544; *Berry v. Jourdan*, 11 Rich. L. 67; *Flato v. Brod*, 37 Tex. 735; *Harrison v. Middleton*, 11 Gratt. 527; *Folsom v. Apple River Log-Driving Co.* 41 Wis. 602; *New York & C. Mining Syndicate & Co. v. Fraser*, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665.

**Calloway v. Varner*, 77 Ala. 541; *People v. Munroe* (Cal.) 33 Pac. 776; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344; *Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854; *Mead v. McGraw*, 19 Ohio St. 57; *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

Where the notes of a reporter from which an article was written have been destroyed, he may be allowed to refer to and read the article as published to refresh his memory, where it contains substantially the article as written. *Hawes v. State*, 88 Ala. 37, 7 So. 302; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426.

The correctness of a copy of a memorandum made by someone other than the witness must be proved before he will be allowed to refresh his memory from it. *Birmingham v. McPoland*, 96 Ala. 363, 11 So. 427. And a witness cannot refresh his memory from a memorandum made up at his dictation by his attorney from old letters, memoranda, and receipts. *Watson v. Miller*, 82 Tex. 279, 17 S. W. 1053.

*The weight of authority is to the effect that where a witness refers to a copy of a memorandum merely to refresh his recollection the original need not be produced or accounted for. *Denver & R. G. R. Co. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67; *Erie Preserving Co. v. Miller*, 52 Conn. 446, 52 Am. Rep. 607; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Harrison v. Middleton*, 11 Gratt. 527. *Contra*, *Jones v. Jones*, 94 N. C. 114; *Byrnes v. Pacific Exp. Co.* (Tex. App.) 15 S. W. 46. But his refusal to produce the original may be considered by the jury in weighing his testimony. *Chicago & A. R. Co. v. Adler*, 56 Ill. 344; *Davie v. Jones*, 68 Me. 393.

**Morris v. Everly*, 19 Colo. 529, 36 Pac. 150; *Cameron v. Blackman*, 39 Mich. 108; *Mead v. White* (Pa.) 3 Atl. 913; *Birchall v. Bullough* [1896] 1 Q. B. 325, 65 L. J. Q. B. N. S. 252, 74 L. T. N. S. 27.

**Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Flynn v. Gardner*, 3 Ill. App. 253; *O'Brien v. Stambach*, 101 Iowa, 40, 69 N. W. 1133; *Wright v. Wright*, 58 Kan. 525, 50

Pac. 444; *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109; *Costello v. Crowell*, 133 Mass. 352; *Stahl v. Duluth*, 71 Minn. 341, 74 N. W. 143; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731; *Abel v. Strimple*, 31 Mo. App. 86; *Bateman v. New York C. & H. R. R. Co.* 47 Hun, 429; *State v. Colwell*, 3 R. I. 132; *State v. Rawls*, 2 Nott & M'C. 332; *Davis v. Field*, 56 Vt. 426; *Harrison v. Middleton*, 11 Gratt. 527; *Schettler v. Jones*, 20 Wis. 412; *McClaskey v. Barr*, 45 Fed. Rep. 151. *Contra*, *Clark v. State*, 4 Ind. 156; *Redden v. Spruance*, 4 Harr. (Del.) 217; *Owings v. Shannon*, 1 A. K. Marsh. 188.

Otherwise where a paper was drawn up several weeks after the fact occurred, unless the witness can speak from his memory after being refreshed by it. *O'Neale v. Walton*, 1 Rich. L. 234.

¹¹*Peck v. Lane*, 3 Lans. 136; *Atchison, T. & S. F. R. Co. v. Hays* (Kan. App.) 54 Pac. 322; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Wernuag v. Chicago & A. R. Co.* 20 Mo. App. 473; *McKivitt v. Cone*, 30 Iowa, 455; *National Bank of Commerce v. First Nat. Bank*, 27 U. S. App. 88, 61 Fed. Rep. 809, 10 C. C. A. 87; *Chute v. State*, 19 Minn. 271, Gil. 230.

But he is not bound to introduce it in evidence. *Little v. Lichkoff*, 98 Ala. 321, 12 So. 429. And he may waive the right of inspection. *Adae v. Zangs*, 41 Iowa, 536; *Wernuag v. Chicago & A. R. Co.* 20 Mo. App. 473.

Where a witness consults a diary to refresh his memory with respect to a date the entire book need not be exposed to inspection, but only such parts of it as he consults or such as relate to the subject-matter of his testimony. *Com v. Haley*, 13 Allen, 587. Otherwise where the diary seems to have been prepared for the occasion, being kept for only a few days, but purporting to include the date in question. *Kouba v. Horacek*, 53 Hun, 636, 6 N. Y. Supp. 250.

¹²*State v. Collins*, 15 S. C. 379, 40 Am. Rep. 697; *State v. Cheek*, 35 N. C. (13 Ired. L.) 114; *Wabash & E. Canal v. Bledsoe*, 5 Ind. 133.

¹³So held even under a statute providing that where a witness is allowed to refresh his memory the writing must be produced and may be inspected by the adverse party who may read it to the jury. *State v. Magers* (Or.) 58 Pac. 892.

¹⁴*Hall v. Ray*, 18 N. H. 126.

¹⁵*Johnson v. Coles*, 21 Minn. 108; *Bullock v. Hunter*, 44 Md. 417.

¹⁶*Com. v. Fox*, 7 Gray, 585. In this case the witness was directed to withdraw with one counsel on each side and have the paper read to her without comment.

¹⁷*Billingslea v. State*, 85 Ala. 323, 5 So. 137; *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261; *State v. Miller*, 53 Iowa, 154, 4 N. W. 900; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *People v. Palmer*, 105 Mich. 568, 63 N. W. 656; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *George v. Triplett*, 5 N. D. 50, 63 N. W. 891; *Hurley v. State*, 46 Ohio St. 320, 4 L. R. A. 161, 21 N. E. 645.

The witness must, however, speak from his own recollection. *Howie v. Rea*, 75 N. C. 326.

¹¹*Com. v. Phelps*, 11 Gray, 73; *Velott v. Lewis*, 102 Pa. 326.

¹²*Putman v. United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923.

¹³*George v. Joy*, 19 N. H. 544.

22. Direct examination; adverse party.

The direct examination of a witness cannot properly be limited by the court to the question whether he agrees with or differs from the testimony of a prior witness with respect to a transaction at which he was present, even though the objecting party is allowed full privilege of cross-examination.¹ Nor can a witness be asked whether the facts stated in a particular paper are true. He should be interrogated as to these facts particularly.² But the witness may be asked to state generally the consideration of his note, leaving the details to be supplied by cross-examination,³ and the court may refuse to permit a witness on his direct examination to detail the whole of a conversation to which he has referred.⁴

A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.⁵

More than ordinary freedom is permitted in the direct examination of a witness who is hostile to the party calling him,⁶ and this principle is recognized by those statutes which authorize one party to compel the other to testify in his behalf, such statutes generally providing that the examination may be conducted under the rules applicable to the cross-examination of other witnesses.⁷

¹*Eames v. Eames*, 41 N. H. 177.

²*Richardson v. Golden*, 3 Wash. C. C. 109, Fed. Cas. No. 11,782.

³*Ayrault v. Chamberlain*, 33 Barb. 229.

⁴*Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

⁵*O'Hagan v. Dillon*, 76 N. Y. 170; *State v. Jeandell*, 5 Harr. (Del.) 475.

⁶See *supra*, § 17.

⁷*Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532; *Re Brown*, 38 Minn. 112, 35 N. W. 726; *Pfefferkorn v. Seefeld*, 66 Minn. 223, 68 N. W. 1072; *Coates Bros. v. Wilkes*, 92 N. C. 376.

Under a statute providing that a party to the record or a person for whose immediate benefit a proceeding is prosecuted or defended may be compelled to testify as if under cross-examination, it is held that leading questions may be put to a party called as a witness by his adversary, and

that any facts or admissions may be drawn from him which tend to weaken his case or strengthen that of his adversary. *Brubaker v. Taylor*, 76 Pa. 83. But a husband cannot in an action of ejectment to which his wife is not a party call her as for cross-examination upon the allegation that her interest is adverse to his. *Wells v. Bunnell*, 160 Pa. 460, 28 Atl. 851. Nor can plaintiff's husband be called by defendant as on cross-examination, where he is not a party interested, and there is no evidence that he was his wife's agent. *Callendar v. Kelly*, 190 Pa. 455, 42 Atl. 957. And the motorman of a street-railway company is not a party nor a person having legal interest in a suit for personal injuries against the company, so as to entitle the plaintiff to call him as if on cross-examination. *Callary v. Easton Transit Co.* 185 Pa. 176, 39 Atl. 813.

In Delaware a party cannot, since the passage of a general statute removing all disabilities of parties to testify, call an adverse party as a witness in cross-examination; and if he desires to call him must make him his own witness. *Terry v. Platt* (Del.) 40 Atl. 243.

23. Right to cross-examine.

The right of cross-examination is deemed so essential that a party is not entitled to the benefit of the direct examination of a witness whom his adversary has had no opportunity to cross-examine.¹ Otherwise where the party has failed to improve an opportunity for cross-examination when afforded² or has voluntarily deprived himself of the right.³

A party who has been examined by his adversary may be cross-examined by his own counsel as to any matter relevant to his examination in chief,⁴ and one whose interest in the subject-matter accrued before the commencement of an action is entitled upon being added as a party defendant to cross-examine witnesses previously examined, although he has already cross-examined them as attorney for the other defendants.⁵ A witness who, on direct examination, volunteers an uncalled-for statement which is allowed to go to the jury without objection, may be cross-examined with reference thereto,⁶ though if the statement is irrelevant such cross-examination is not a matter of right.⁷

The right to cross-examine is not affected because the testimony in chief was out of proper order to anticipate a defense⁸ or was unnecessary because of a statute permitting an affidavit to be filed in lieu thereof.⁹ But there can be no cross-examination upon evidence which has been stricken out of the case.¹⁰

¹A party is not entitled to the benefit of the direct examination of a witness who has died after he has been examined in chief and before the adverse party has had an opportunity to avail himself of a cross-examination (*Kissam v. Forrest*, 25 Wend. 651), or to complete an examination al-

ready begun. *Sperry v. Moore*, 42 Mich. 353, 4 N. W. 13. So held where the witness became suddenly so severely ill as to render her cross-examination impossible. *People v. Cole*, 43 N. Y. 508, citing with approval *Kissam v. Forrest*, 25 Wend. 651, and declaring *Forrest v. Kissam*, 7 Hill, 463, to be "no authority". So where the witness fails to appear for further cross-examination (*Matthews v. Matthews*, 53 Hun, 244, 6 N. Y. Supp. 589), or refuses to answer a question pertinent and not privileged. *Burnett v. Phalon*, 11 Abb. Pr. 157.

*As where a witness who failed to appear for further cross-examination at the day fixed by the court was present in court between the time she was excused and the day fixed, and counsel and court were then reminded that she was actively engaged in seeking a position on an ocean vessel and the propriety of then resuming her cross-examination was suggested and declined. *Townsend's Succession*, 40 La. Ann. 66, 3 So. 488. So where the witness died during an adjournment taken before his cross-examination was completed, the circumstances attending the adjournment not being disclosed and it not appearing that the party was deprived of the opportunity of then completing his cross-examination if he had desired to do so. *Curtice v. West*, 50 Hun, 47, 2 N. Y. Supp. 507, Affirmed without opinion in 121 N. Y. 696, 24 N. E. 1099.

*A party who voluntarily deprives himself of his right to cross-examine a witness by consenting to the admission in evidence of the written showing of what the witness would prove, cannot, after the trial has begun, complain that he was deprived of the right to cross-examine the witness. *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 11 So. 695.

**Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378.

**Lange v. Braynard*, 104 Cal. 156, 37 Pac. 868.

**Apple v. Marion County Comrs.* 127 Ind. 553, 27 N. E. 166.

**People v. French*, 95 Cal. 371, 30 Pac. 567.

**Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

*A party who takes the stand for the purpose of laying the foundation for the introduction of the record of a conveyance in place of the original, instead of filing an affidavit as permitted by statute, is subject to cross-examination to test the correctness and accuracy of his statement. *Scott v. Bassett*, 174 Ill. 390, 51 N. E. 577.

**Jones v. State*, 35 Fla. 289, 17 So. 284; *Callison v. Smith*, 20 Kan. 36.

24. — how far limited to direct.

By the English rule which is followed in several of the states a witness who is sworn and gives some evidence, however formal or unimportant, may be cross-examined in relation to all matters involved in the issues.¹ But a stricter rule, sometimes called by way of distinction the "American rule," obtains in the Federal and very many of the state courts. Under this rule the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with

the matters stated in his direct examination.² In the application of this rule much is left to the discretion of the trial court.³

A cross-examination always may include whatever tends to qualify or explain the direct testimony of a witness or to rebut or modify any inference resulting from it.⁴ It is always permissible to inquire into the details of the events testified to in chief by a witness and to develop and unfold the whole transaction about which he has only been partially interrogated.⁵ So, where one party introduces evidence of a part of a conversation, his adversary has a right to draw out all that was said in the conversation material to the case.⁶

A wide latitude will be allowed on the cross-examination of witnesses in an action in which fraud is an issue,—especially of such witnesses as are parties to the alleged fraudulent transaction;⁷ and it has been said that the cross-examination of a party testifying in his own behalf need not be so strictly confined to the matters inquired into upon his direct examination as in the case of other witnesses,⁸ but this is a matter of discretion with the trial court and not a right of the adverse party.⁹

¹*Huntsville Belt Line & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Dawson v. Callaway*, 18 Ga. 573; *News Pub. Co. v. Butler*, 95 Ga. 559, 22 S. E. 282; *King v. Atkins*, 33 La. Ann. 1057; *Beal v. Nichols*, 2 Gray, 262; *Ireland v. Cincinnati, W. & M. R. Co.* 79 Mich. 163, 44 N. W. 426; *Page v. Kankey*, 6 Mo. 433; *State v. Allen*, 107 N. C. 805, 11 S. E. 1016; *Kibler v. McIlwain*, 16 S. C. 551; *Rhine v. Blake*, 59 Tex. 240.

²*Braly v. Henry*, 77 Cal. 324, 19 Pac. 529; *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Ashborn v. Waterbury*, 69 Conn. 217, 37 Atl. 498; *Woodbury v. District of Columbia*, 5 Mackey, 127; *Tischler v. Apple*, 30 Fla. 132, 11 So. 273; *Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. 622, Affirming 45 Ill. App. 250; *Cokely v. State*, 4 Iowa, 477; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Atchison v. Rose*, 43 Kan. 605, 23 Pac. 561; *McCormick v. Glicm*, 13 Mont. 469, 34 Pac. 1016; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Buckley v. Buckley*, 14 Nev. 262; *Pearce v. Strickler* (N. M.) 54 Pac. 748; *Neil v. Thorn*, 88 N. Y. 270; *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Rheinfeldt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281 (The early New York cases followed the English rule. *Varick v. Jackson ex dem. Eden*, 2 Wend. 166, 19 Am. Dec. 571; *Fulton Bank v. Stafford*, 2 Wend. 483. Except in cases of inquest taken by default. *Hartness v. Boyd*, 5 Wend. 563; *Kerker v. Carter*, 1 Hill, 101); *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Fulton v. Central Bank*, 92 Pa. 112; *Rosum v. Hodges*, 1 S. D. 308, 9 L. R. A. 817, 47 N. W. 140; *People v. Thiede*, 11 Utah, 241, 39 Pac. 837; *Stiles v. Estabrook*, 66 Vt. 535, 29 Atl. 961; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535.

The rule has in some jurisdictions been somewhat relaxed. Thus, matters tending to disprove plaintiff's cause of action and the case made out by his witnesses may be inquired into on cross-examination of a witness who was not interrogated as to those matters on his direct examination. *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749; *Legg v. Drake*, 1 Ohio St. 286. In *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, the court, after an exhaustive review of the authorities, adopts these rules: "1. When an adverse witness has testified to any point material to the party calling him he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him except upon exclusively new matter, and nothing is deemed new matter except such as could not be given under a general denial. 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross action or counterclaim affords no reason why it should be excluded." And in an action by an employee for personal injuries alleged to have resulted from the incompetency of a fellow servant, it was held that the latter, who has sworn to facts contemporaneous with the injury and closely connected with the main fact might be cross-examined as to the entire case. *Jorgenson v. Butte & M. Commercial Co.* 13 Mont. 288, 34 Pac. 37.

**Glenn v. Gleason*, 61 Iowa, 32, 15 N. W. 659; *Pennsylvania Co. v. Newmeyer*. 129 Ind. 401, 28 N. E. 860; *Neil v. Thorn*, 88 N. Y. 270; *Hardy v. Norton*. 66 Barb. 527; *Helser v. McGrath*, 52 Pa. 531; *Carroll v. Centralia Water Co.* 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *Davis v. Coblens*, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. Rep. 832.

**Wilson v. Wagar*, 26 Mich. 452; *Campau v. Dewey*, 9 Mich. 381, 419; *Haynes v. Ledyard*, 33 Mich. 319; *Ferguson v. Rutherford*, 7 Nev. 385; *Al Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Blake v. Powell*, 26 Kan. 320. And see, for instances, *Baird v. Daly*, 68 N. Y. 547; *Mayer v. People*, 80 N. Y. 364; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Day v. Donohue*, 62 N. J. L. 380, 41 Atl. 934; *Post Pub. Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. Rep. 530, 8 C. C. A. 201; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Pullen*, 41 N. J. Eq. 417, 5 Atl. 658; *Thomas v. Miller*, 151 Pa. 482, 25 Atl. 127.

**Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385; *Evans v. Mohr*, 42 Ill. App. 225; *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64; *State v. Kent*, 5 N. D. 516, *sub nom.* *State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Gilmer v. Higley*, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; *Eames v. Kaiser*, 142 U. S. 488, 35 L. ed. 1090, 12 Sup. Ct. Rep. 302.

**Metzer v. State*, 39 Ind. 596; *United States v. Knowlton*, 3 Dak. 58, 13 N. W. 573; *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985; *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 351.

But the admission of a part of the conversation does not warrant the introduction on cross-examination of other portions that do not tend to ex-

plain that already admitted and that are objectionable on other grounds. *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371, 23 S. W. 446.

Chapman v. James, 96 Iowa, 233, 64 N. W. 795; *Clark v. Reiniger*, 66 Iowa, 507, 24 N. W. 16; *De Ford v. Orvis*, 42 Kan. 302, 21 Pac. 1105; *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962; *Ganong v. Green*, 71 Mich. 1, 38 N. W. 661; *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825; *Cohen v. Goldberg*, 65 Minn. 473, 67 N. W. 1149; *Hallock v. Alvord*, 61 Conn. 194, 23 Atl. 131; *Dorrance v. McAlester* (Ind. Terr.) 45 S. W. 141; *Barnett v. Farmers' Mut. F. Ins. Co.* 115 Mich. 247, 73 N. W. 372; *Lynch v. Free*, 64 Minn. 277, 66 N. W. 973; *Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145; *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Bennett v. McDonald*, 52 Neb. 278, 72 N. W. 268; *Armagost v. Rising*, 54 Neb. 763, 75 N. W. 534; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279, Affirming 90 Hun, 89, 35 N. Y. Supp. 538; *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.

Rea v. Missouri, 17 Wall. 542, 21 L. ed. 709; *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321. Contra, *Hansen v. Miller*, 145 Ill. 538, 32 N. E. 548.

Norris v. Cargill, 57 Wis. 251, 15 N. W. 148; *Rca v. Missouri*, 17 Wall. 542, 21 L. ed. 709.

25. — witnesses to opinions or values.

Considerable latitude should be allowed in cross-examining witnesses to values in order to test the accuracy of their knowledge and the reasonableness of their estimates.¹ So it is proper that opinion evidence be subjected to every legitimate test on cross-examination in order that its value may be properly weighed,² and for this purpose the witness may be interrogated as to the grounds on which his opinion is based.³

Hypothetical questions may properly be asked of an expert witness on cross-examination,⁴—especially to test his skill or knowledge;⁵ and questions pertinent to the inquiry may be propounded for this purpose although assuming facts for which there is no foundation in the evidence;⁶ but the allowance of such questions rests in the sound discretion of the trial court.⁷

¹*Buist v. Guice*, 105 Ala. 518, 16 So. 915; *St. Louis & S. F. R. Co. v. Sagley*, 56 Ark. 549, 20 S. W. 413; *Levinson v. Sands*, 74 Ill. App. 273; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Snouffer v. Chicago & N. W. R. Co.* 105 Iowa, 681, 75 N. W. 501; *Chicago, K. & N. R. Co. v. Stewart*, 47 Kan. 704, 28 Pac. 1017; *Curren v. Ampersce*, 96 Mich. 553, 56 N. W. 87; *Sigafoos v. Minneapolis, L. & M. R. Co.* 39 Minn. 8, 38 N. W. 627; *Yazoo-Mississippi Delta Levee Comrs. v. Dillard*, 76 Miss. 641, 25 So. 292; *Chase v. Corson*, 67 N. H. 598, 32 Atl. 775; *Oregon Pottery Co. v. Kern*, 30 Or. 328, 47 Pac. 917; *Lentz v. Carnegie Bros.* 145 Pa. 612, 23 Atl. 219; *Cranmer v. Building & L. Asso.* 6 S. D. 341, 61 N. W. 35; *Gulf, C. & S. F. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441.

But a witness who is first asked on cross-examination to testify to value cannot be further cross-examined on collateral matters to show that his opinion is of no value. *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 663.

Thus, such witnesses may be cross-examined as to the grounds for their opinions (*Re Jack*, 115 Cal. 203, 46 Pac. 1057; *Missouri, K. & T. R. Co. v. Haines*, 10 Kan. 439; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547), and as to the elements of value on which they are based. *Humes v. Decatur Land Improv. & Furnace Co.* 98 Ala. 461, 13 So. 368; *Eslich v. Mason City & Ft. D. R. Co.* 75 Iowa, 443, 39 N. W. 700; *Morrill v. Palmer*, 68 Vt. 1, 33 L. R. A. 411, 33 Atl. 829.

*A wide range should be given to the cross-examination of an expert witness for the purpose of testing his knowledge of the subject upon which he assumes to testify. *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791; *Batten v. State*, 80 Ind. 394; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Andre v. Hardin*, 32 Mich. 324; *Titus v. Gage*, 70 Vt. 14, 39 Atl. 246; *Chicago & A. R. Co. v. Redmond*, 171 Ill. 347, 49 N. E. 541; *Lewis v. Boston Gas-light Co.* 165 Mass. 411, 43 N. E. 178. For cases illustrative of the scope of cross-examination of expert witnesses on the question of insanity, see note to *Burt v. State* (Tex. Crim. App.) 39 L. R. A. 326. And for cross-examination of nonexperts on the question of insanity, see note to *Ryder v. State* (Ga.) 38 L. R. A. 743.

It is competent on cross-examination for the purpose of testing his skill to ask a medical witness the probable results of a personal injury. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193, 21 N. E. 968; *State v. Reddick*, 7 Kan. 143. But a physician who has testified that an injury can probably be cured by a dangerous and intensely painful operation cannot be asked if he would submit to the operation himself if similarly afflicted. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363.

A witness who has testified on direct examination, not only as to the facts in the case, but also as a medical expert, may be cross-examined, not only concerning the facts testified to in chief, but also to test his skill and knowledge as an expert. *Shields v. State*, 149 Ind. 395, 49 N. E. 351. And a subscribing witness who has testified to the sanity of the testator may be cross-examined as to his qualification as an expert, where he testified upon direct examination that he was an experienced physician and surgeon and attended the testator during his last illness. *Re Mullin*, 110 Cal. 252, 42 Pac. 645. But counsel cannot on cross-examination ask a witness who is not called or examined in chief as an expert, nor asked to give a professional opinion on the facts to which he testifies, questions permissible only in the case of an expert witness, unless he makes the witness his own. *Olmsted v. Gere*, 100 Pa. 127; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 517, 47 Pac. 364. And an expert whose direct testimony was confined to a contradiction of the theory of the experts of the adverse party cannot, on cross-examination, be asked a question which forms a part of the latter's affirmative case, and which cannot be justified as testing the competency of the witness. *Gridley v. Boggs*, 62 Cal. 190.

The value of the opinions of experts who have testified from comparison, as

to the genuineness of signatures, may be tested by inquiring as to the genuineness of two signatures of a witness in the case, one admitted to be genuine and the other claimed by him to have been written by another. *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429. But spurious signatures cannot be intermingled with the genuine and a nonexpert witness be required on cross-examination to select the genuine. *Andrews v. Hayden*, 88 Ky. 455, 11 S. W. 428. Nor can the accuracy of an expert who has given his opinion upon the question whether a disputed, and an admittedly genuine, writing were written by the same person, be tested by inquiring on cross-examination whether the disputed document and another writing of unknown authorship were in the same handwriting or written by the same person, as a collateral inquiry would thus be raised. *State v. Griswold*, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046. Otherwise where all the writings are claimed to have been written by the same person. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808. And it has been held that the accuracy of the judgment of a handwriting expert cannot be tested on cross-examination by asking his opinion as to the genuineness of the handwriting on papers irrelevant to the issues (*Armstrong v. Thruston*, 11 Md. 148), nor by requiring him to examine a number of slips containing unproved handwriting and to state how many different kinds of handwriting he finds. *State v. Griswold*, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046.

▲ witness who answers a question on cross-examination as fully and specifically as he can with his present knowledge will not be compelled, for the purpose of further answers, to acquire fresh information or increase his store of knowledge. *Celluloid Mfg. Co. v. Crane Chemical Co.* 14 N. J. L. J. 55.

**Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *Dresback v. State*, 38 Ohio St. 365; *Plummer v. Ossipee*, 59 N. H. 55; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Where experts are ordered to examine a party and are called and questioned by the adverse party as to the result of their examination, the former has the right to ask on cross-examination how the examination was conducted and what questions were propounded to him. *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

*An expert witness who has been examined upon the theory of the party calling him may be cross-examined by taking his opinion, based on any other set of facts assumed by the opposite party to have been proved, or upon a hypothetical case based upon the latter's theory. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *People v. Lake*, 12 N. Y. 358; *Barney v. Fuller*, 61 Hun, 618, 15 N. Y. Supp. 694, Affirmed in 133 N. Y. 605, 30 N. E. 1007.

**People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943.

**Williams v. Great Northern R. Co.* 68 Minn. 55, 37 L. R. A. 199, 70 N. W. 860; *Dilleber v. Home L. Ins. Co.* 87 N. Y. 79; *Missouri, K. & T. R. Co. v. Johnson* (Tex. Civ. App.) 49 S. W. 265.

But it is improper on cross-examination to erroneously assume facts to have been proved,—“especially when it is for the purpose of getting the opinion of an expert on a mere hypothesis, not to test his skill or accuracy, but to obtain evidence in support of the defense.” *State v. Stokely*, 16 Minn. 232, Gil. 249. And generally hypothetical questions on cross-examination must be based on facts in evidence. *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826; *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130.

¹*Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *People v. Augsburg*, 97 N. Y. 501; *West Chicago Street R. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447.

26. — witnesses to character or reputation.

Witnesses called to testify to the character or reputation of others may be liberally cross-examined to test the nature and extent of their knowledge.¹ They may be required to disclose the source of their information,² and may be cross-examined as to any facts or rumors which tend to contradict the purpose and effect of their direct testimony.³

¹*State v. Miller*, 71 Mo. 89; *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655.

A witness who testifies to the reputation of another witness for truth or veracity may be asked on cross-examination what constitutes reputation. *Hutts v. Hutts*, 62 Ind. 214. So, a witness who has testified to the bad reputation for moral worth of the plaintiff in an action for slander may be asked on cross-examination what particular immorality was imputed to him. *Leonard v. Allen*, 11 Cush. 241. But a witness who has testified in support of the character and the credibility of another witness cannot be asked on cross-examination whether he would believe him upon oath if he were to swear differently from the witness himself. *Ramsey v. State*, 89 Ga. 198, 15 S. E. 6. Where a witness states that he knows the general reputation of another for truth and veracity he should be permitted to go on and testify to the nature of that reputation, without being interrupted by a cross-examination to test the extent and source of his information. *Nelson v. State*, 32 Fla. 244, 13 So. 361.

²A witness who swears to the general bad character of another for truth and veracity may, upon cross-examination, be required to name the individuals from whom he received his information (*Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Bates v. Barber*, 4 Cush. 107; *Annis v. People*, 13 Mich. 511; *Lower v. Winters*, 7 Cow. 263), and to state what they said. *State v. Perkins*, 66 N. C. 126.

³A witness called to testify to the reputation of another witness for truth and veracity may be asked on cross-examination whether he has not heard reports which tend to weaken the effect of his direct testimony. *Hutts v. Hutts*, 62 Ind. 240; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315. The same question may be asked of a witness who has testified to the general reputation for skill of a physician and surgeon. *Carpenter v. Blake*, 10 Hun, 358. But a witness who testifies to the bad reputation

of plaintiff in an action for libel with respect to the corrupt use of money in political connections cannot be asked on cross-examination if such charges are not common against politicians. *Randall v. Evening News Asso.* 97 Mich. 146, 56 N. W. 361. Nor can a witness who has testified to the bad moral character of another be asked on cross-examination whether he has ever heard certain designated persons, not shown to have been acquainted with or to live in the neighborhood of the person whose character is in question, speak of the latter's character. *State v. Allen*, 100 Iowa, 7, 69 N. W. 274. Testimony in chief that the general reputation of a witness for truth and veracity is good was held in *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94, to open the door for cross-examination in regard to his reputation for integrity or honesty. The court laid down the rule that, where a person has testified in chief that as to one of the elements of moral character the reputation of the witness sought to be impeached is good, he may be cross-examined with respect to the reputation of the witness as to any other or all of the essential and constituent elements of good moral character.

27. — to test credibility.

A witness may be interrogated on cross-examination with a view to test the extent of his knowledge, the accuracy of his recollection, and his habits of observation.¹ So, his interest in the event of the suit, and his bias, prejudice, or hostility towards either of the parties, may be made the subject of inquiry for the purpose of testing the weight to be given to his testimony,² and he may be asked whether he has not made statements inconsistent with his testimony in chief for the purpose of affecting his credit³ or laying the foundation for his impeachment.⁴

The authorities are not harmonious upon the question whether counsel on cross-examination may ask questions relating to specific facts which tend to discredit the witness or to impeach his moral character, even though not relevant to the issues.⁵ But even where such inquiries are not forbidden, their allowance or rejection rests in the sound discretion of the trial judge,⁶ and he may exclude them on the objection of the party where no claim of privilege is interposed.⁷ And a witness cannot be cross-examined as to any fact which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he denies it.⁸

¹*Davis v. California Powder-Works*, 84 Cal. 617, 24 Pac. 387; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471; *Schwartz v. Wood*, 67 Hun, 648, 21 N. Y. Supp. 1053; *Derk v. Northern C. R. Co.* 164 Pa. 243, 30 Atl. 231; *Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629; *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 27 S. E. 20.

Thus a witness may be asked on cross-examination whether he understood

a question propounded on his direct examination (*Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860), and whether he has talked with others in reference to the facts of the case before going on the stand. *Boulden v. State*, 102 Ala. 78, 15 So. 341. And two witnesses who testify to facts observed by them while in company may be cross-examined as to concert of action between them and as to how much the story of either or both has been changed or developed by conversations or otherwise. *State v. Hayward*, 62 Minn. 474, 65 N. W. 63. So, a witness may be asked whether he was not under the influence of intoxicating liquors at the time of the occurrences with regard to which he is testifying (*International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377; *State v. Rhodes*, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306), or whether he is not at the time of testifying under such influence. *Pool v. Pool*, 33 Ala. 145. But a witness cannot be asked whether or not she is addicted to the morphine habit, unless it is proposed to show that she was under its influence when the events happened about which she testifies or at the time of testifying, or it appears that her powers of recollection are impaired thereby. *State v. Gleim*, 17 Mont. 17, 31 L. R. A. 294, 41 Pac. 998. And the range which a cross-examination of this character may take is left to the sound discretion of the trial court. *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *State v. Duffy*, 57 Conn. 525, 18 Atl. 791.

**Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; *Long v. Booc*, 106 Ala. 570, 17 So. 716; *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581; *Driggers v. State*, 38 Fla. 7, 20 So. 758; *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 So. 845; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Harrington v. Hamburg*, 85 Iowa, 272, 52 N. W. 201; *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264; *Archer v. Helm*, 70 Miss. 874, 12 So. 702; *Cambeis v. Third Ave. R. Co.* 1 Misc. 158, 20 N. Y. Supp. 633; *Cady v. Bradshaw*, 116 N. Y. 188, 5 L. R. A. 557, 22 N. E. 371; *Wallach v. Kalccheim*, 25 Misc. 171, 54 N. Y. Supp. 148; *Hanson v. Red Rock Twp.* 7 S. D. 38, 63 N. W. 156; *Graham v. McReynolds*, 88 Tenn. 240, 12 S. W. 547; *Cox v. Missouri, K. & T. R. Co.* (Tex. Civ. App.) 48 S. W. 745; *Atkinson v. Reed* (Tex. Civ. App.) 49 S. W. 260; *Vermont Farm Mach. Co. v. Batchelder*, 68 Vt. 430, 35 Atl. 378; *Stossel v. Van De Vanter*, 16 Wash. 9, 47 Pac. 221; *Suit v. Bonnell*, 33 Wis. 180.

The prejudice must exist at the trial or have arisen so recently that it may be assumed to continue down to that time (*Higham v. Gault*, 15 Hun, 383), and the interest must not be too remote (*Bevan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679), although the fact that the witness may have parted with his interest in the suit before the trial will not preclude the inquiry. *Trinity County Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; *Klatt v. N. C. Foster Lumber Co.* 97 Wis. 641, 73 N. W. 563. The hostility of a witness towards a person not a technical party to the action may be a proper subject of inquiry where the latter's relation to parties or subject-matter is such that the prejudice of the witness may influence the character of his testimony. *Somerset County Comrs. v. Minderlein*, 67 Md. 566, 11 Atl. 57; *Philadelphia use of McGinn v. Reeder*, 173 Pa. 281, 34 Atl. 17.

The extent to which a witness may be so cross-examined is in the discretion of the trial court. *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Lustig v. New York, L. E. & W. R. Co.* 65 Hun, 547, 20 N. Y. Supp. 477; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271.

**Freeman v. Hensley* (Cal.) 30 Pac. 792; *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698; *Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127; *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Robertson v. Craver*, 88 Iowa, 381, 55 N. W. 492; *Southern Kansas R. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408; *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497; *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130; *Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398; *Beuerlien v. O'Leary*, 149 N. Y. 33, 43 N. E. 417; *Walley v. Desenet Nat. Bank*, 14 Utah, 305, 47 Pac. 147; *Stacy v. Milwaukee, L. S. & W. R. Co.* 72 Wis. 331, 39 N. W. 532.

A party may on cross-examination be asked if he did not make statements in his pleadings contrary to his testimony (*Hall v. Chicago, R. I. & P. R. Co.* 84 Iowa, 311, 51 N. W. 150; *Hare v. Mahoney*, 60 Hun, 576, 14 N. Y. Supp. 81), and in an action on an open account may be cross-examined as to inconsistencies between his testimony and the original statement on which the original petition was based, although both the original petition and account have been abandoned. *Ryan v. Dutton* (Tex. Civ. App.) 38 S. W. 546. But a party is entitled to have his pleadings in a former suit exhibited to him before being required to testify with reference thereto. *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429. A witness may be cross-examined as to his testimony on a former trial inconsistent with his present testimony. *Brooks v. Rochester R. Co.* 156 N. Y. 244, 50 N. E. 945; *Waterman v. Chicago & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136. And the record of his former testimony need not be produced. *Oderkirk v. Fargo*, 61 Hun, 418, 16 N. Y. Supp. 220. *Contra*, *People v. Ching Hang Chang*, 74 Cal. 389, 16 Pac. 201. If the inconsistent statements are in writing they must be first produced and shown or read to the witness, or the nonproduction accounted for. *East Tennessee, V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

The extent of the interest or prejudice is as material as the main fact of its existence. *Blenkiron v. State*, 40 Neb. 11, 58 N. W. 587; *Stewart v. Kindel*, 15 Colo. 539, 25 Pac. 990; *State v. Collins*, 33 Kan. 77, 5 Pac. 368; *State v. Dee*, 14 Minn. 35, Gil. 27. But a witness admitted to be interested in the result of a suit because of contract relations with one of the parties cannot be compelled to produce the contracts for the purpose of showing the extent of his interest. *Goss Printing-Press Co. v. Scott*, 89 Fed. Rep. 818. Nor can a witness who has admitted an attempt to procure a settlement be questioned as to the amount demanded. *Pomaski v. Grant* (Mich.) 78 N. W. 891. And a witness cannot be examined as to the character of a difficulty claimed to have generated an ill feeling against the cross-examining party until the state of feeling between them has been inquired into. *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272. So, a witness who has admitted that he had trouble with one of the parties, growing out of a law suit tried and settled to the satisfaction of the parties years before, cannot be asked to state the amount of the judgment recovered against him in that action. *Boldon v. Thomp-*

son, 60 Kan. 856, 56 Pac. 131. And it has been held that a witness who has been interrogated as to the state of his feelings towards one of the parties cannot be asked for its cause. *Conyers v. Field*, 61 Ga. 258.

**Hoye v. Chicago, M. & St. P. R. Co.* 46 Minn. 269, 48 N. W. 1117; *Hamilton v. Rich Hill Coal Min. Co.* 108 Mo. 364, 18 S. W. 977; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281; *Missouri, K. & T. R. Co. v. Calnon* (Tex. Civ. App.) 50 S. W. 422; *Walley v. Deseret Nat. Bank*, 14 Utah, 305, 47 Pac. 147; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96; *Waterman v. Chicago & A. R. Co.* 82 Wis. 613, 52 N. W. 247.

And it is immaterial that counsel fails or has no intention to follow up the impeachment by the introduction of evidence to sustain the matters inquired into. *Texas Standard Oil Co. v. Hanlon*, 79 Tex. 678, 15 S. W. 703.

*The allowance of such questions seems to be favored in some jurisdictions as a proper mode of testing the credibility of the witness. *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Roberts v. Com.* 14 Ky. L. Rep. 219, 20 S. W. 267; *People v. Irving*, 95 N. Y. 541; *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Zanone v. State*, 97 Tenn. 101, 35 L. R. A. 556, 36 S. W. 711; *Muller v. St. Louis Hospital Asso.* 5 Mo. App. 390, Affirmed in 73 Mo. 243; *Carroll v. State*, 32 Tex. Crim. Rep. 431, 24 S. W. 100. So held even under a statute providing that a witness cannot be impeached by evidence of wrongful acts. *Oxier v. United States* (Ind. Terr.) 38 S. W. 331. But see *State v. Houx*, 109 Mo. 654, 19 S. W. 35 (holding that a witness cannot be cross-examined as to the immorality of his previous life unless his answers tend directly to prove some issue); *Gulf, C. & S. F. R. Co. v. Johnson*, 82 Tex. 628, 19 S. W. 151 (holding that a witness cannot be asked whether he is a deserter from the United States army). Under the guise of discrediting the witness he cannot be questioned as to fraudulent transactions of the party calling him collateral to the issue in which the witness participated. *Madden v. Koester*, 52 Iowa, 692, 3 N. W. 790.

The contrary rule is upheld in *Elliott v. Boyles*, 31 Pa. 67; *Holbrook v. Dow*, 12 Gray, 357; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Crawford v. Christian*, 102 Wis. 51, 78 N. W. 406. But see *Prescott v. Ward*, 10 Allen, 203 (in which it was held that, so far as inquiries on cross-examination relating to matters entirely collateral and immaterial to the issue have a tendency to contradict the witness or disparage his character, it is discretionary in the court to allow or reject them). Such a course of examination is prohibited by statute in some states. *Anthony v. State* (Idaho) 55 Pac. 884; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

It is generally permissible, and authorized by statute in some states, to interrogate a witness with respect to a prior conviction of crime without producing the record of conviction. *State v. Martin*, 124 Mo. 514, 28 S. W. 12; *Handlin v. Law*, 34 Ill. App. 84; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619; *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603; *State v. Adamson*, 43 Minn. 196, 45 N. W. 152; *Spiegel v. Hays*, 118 N. Y. 660, 22 N. E. 1105; *Perham v. Noel*, 20 App. Div. 516, 47 N. Y. Supp. 100;

Lights v. State, 21 Tex. App. 308, 17 S. W. 428. *Contra, Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Com. v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *Buck v. Com.* 107 Pa. 486. In some states evidence of this character is limited by statute to a conviction for a felony. *People v. Carolan*, 71 Cal. 195, 12 Pac. 52. Under such a statute a witness cannot be asked whether he was ever convicted of crime. *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389.

That an attorney may be asked on cross-examination whether he has been disbarred was held in *People v. Reavey*, 38 Hun, 418, and denied in *People v. Dorothy*, 20 App. Div. 308, 46 N. Y. Supp. 970. In affirming the latter case the court of appeals without deciding the question held that the witness cannot be required to answer or explain the charges on which the disbarment proceedings rested. *People v. Dorothy*, 156 N. Y. 237, 50 N. E. 800. A discharge or compulsory resignation from the police force was held in *Wroe v. State*, 20 Ohio St. 460, to be a proper subject of inquiry on cross-examination, but the opposite view was maintained in *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345, in which it was held improper to ask a witness if he had been expelled from the fire department. And it is improper to ask a witness whether he has been expelled from the church to which he belonged. *People v. Dorothy*, 156 N. Y. 237, 50 N. E. 800.

It has been held that a witness may be asked whether he has ever been arrested or indicted. *Oxier v. United States* (Ind. Terr.) 38 S. W. 331; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Roberts v. Com.* 14 Ky. L. Rep. 219, 20 S. W. 267; *People v. Hite*, 8 Utah, 461, 33 Pac. 254; *Wroe v. State*, 20 Ohio St. 460; *Linz v. Skinner*, 11 Tex. Civ. App. 512, 32 S. W. 915. But it would seem that such inquiries should be excluded, since the fact of indictment or arrest is not inconsistent with innocence. *State v. Brown*, 100 Iowa, 50, 69 N. W. 277; *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *Smith v. Mulford*, 42 Hun, 347; *V. Locwer's Gambrinus Brewery Co. v. Bachman*, 45 N. Y. S. R. 48, 18 N. Y. Supp. 138. A witness cannot be asked if he has been sued for assault and battery for the purpose of discrediting him (*Yager v. Person*, 42 Hun, 400), nor whether a suit for damages is pending against him because of false swearing in another case (*Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439), nor whether he has not pleaded the statute of limitations to certain specified claims. *Cecil v. Henderson*, 119 N. C. 422, 25 S. E. 1018. Nor can he be questioned with a view to showing that he is an habitual litigant. *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001.

**Bank of Cadiz v. Slemmons*, 34 Ohio St. 142, 32 Am. Rep. 364; *Bissell v. Starr*, 32 Mich. 297; *State v. May*, 33 S. C. 39, 11 S. E. 440; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209.

**South Bend v. Hardy*, 98 Ind. 577; *Third Great Western Turnp. Road Co. v. Loomis* 32 N. Y. 127, 88 Am. Dec. 311; *People v. Braun*, 158 N. Y. 558, 53 N. E. 529; *State v. Bacon*, 13 Or. 143, 9 Pac. 393.

**Eldridge v. State*, 27 Fla. 162, 9 So. 448; *Clinton v. State*, 33 Ohio St. 27; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213; *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550; *Territory v. Campbell*, 9 Mont. 16, 22 Pac.

121; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

But this rule does not limit the cross-examination for the purpose of laying the foundation for impeachment to the particular matters testified to by the witness on his direct examination, nor to such matters as bear directly and immediately upon the issue where they are directly connected with the subject-matter of the action and with the subject-matter of the examination in chief. *Seller v. Jenkins*, 97 Ind. 430.

The test as to whether a fact inquired of on cross-examination is collateral is whether the cross-examining party would be entitled to prove it as part of his own case tending to establish his plea. *Johnson v. State*, 22 Tex. App. 208, 2 S. W. 609; *Hildeburn v. Curran*, 65 Pa. 59.

28. Redirect examination.

A witness may be re-examined to rebut or neutralize any adverse inferences which can be drawn from the evidence elicited on his cross-examination.¹ But the right to such re-examination extends only to such inquiries as tend to explain, modify, or rebut the facts or statements brought out in the cross-examination.² The court may, however, in its discretion permit a witness to be re-examined with reference to subjects not brought out on either his cross-examination or his examination in chief.³

Where a subject is first introduced on cross-examination the party calling the witness may, on his redirect examination, question him with reference thereto⁴ although the evidence would not have been competent on the examination in chief.⁵ And where a portion of a conversation has been drawn out on cross-examination the witness may on redirect examination, be required to state the whole of the conversation so far as it relates to the subject of inquiry on cross-examination.⁶

¹*Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Rumrill v. Ash*, 169 Mass. 341, 47 N. E. 1017; *Norfolk Nat. Bank v. Job*, 48 Neb. 774, 67 N. W. 781; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *State v. Glenn*, 95 N. C. 677; *Westbrook v. Aultman, M. & Co.* 3 Ind. App. 83, 28 N. E. 1011; *Loy v. Petty*, 3 Ind. App. 241, 29 N. E. 788.

²*Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103, 20 Atl. 788; *Dutton v. Woodman*, 9 Cush. 255, 57 Am. Dec. 46; *Backus v. Barber* (Minn.) 77 N. W. 959; *State v. Ussery*, 118 N. C. 1177, 24 S. E. 414; *Robinson v. Peru Plow & Wheel Co.* 1 Okla. 140, 31 Pac. 988; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Ranney v. St. Johnsbury & L. C. R. Co.* 67 Vt. 594, 32 Atl. 810; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Schaser v. State*, 36 Wis. 429; *The Queen's Case*, 2 Brod. & B. 297.

³*Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Brown v. Burrus*, 8 Mo. 26; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857; *Donnelly v. State*, 26 N. J. L. 601; *Hemmens v. Bentley*, 32 Mich. 89; *Baird v. Gleckler*, 7

S. D. 284, 64 N. W. 118; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272.

**Wadsworth v. Dunnan*, 117 Ala. 661, 23 So. 699; *Hamilton v. Miller*, 46 Kan. 486, 26 Pac. 1030; *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N. W. 868; *Gray v. Cooper*, 65 N. C. 183; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Pullman's Palace Car Co. v. Harkins*, 17 U. S. App. 22, 55 Fed. Rep. 932, 5 C. C. A. 326.

An expert may be asked on redirect examination for the reasons of an opinion brought out on cross-examination. *Leslie v. Granite R. Co.* 172 Mass. 468, 52 N. E. 542. So, a witness may testify on redirect examination as to his reasons for his interest disclosed on cross-examination (*Postal Teleg. Cable Co. v. Hulsey*, 115 Ala. 193, 22 So. 854), and as to the reasons for his belief as expressed on cross-examination. *Pullen v. Pullen* (N. J.) 12 Atl. 138. The circumstances attending the conviction of a witness which has been proved on his cross-examination cannot be explained on a redirect examination (*Lamoureux v. New York, N. H. & H. R. Co.* 169 Mass. 338, 47 N. E. 1009), though the witness has a right on redirect examination to show his innocence. *Sims v. Sims*, 75 N. Y. 466; *Wolkoff v. Tefft*, 35 N. Y. S. R. 93, 12 N. Y. Supp. 464.

**McElheny v. Pittsburgh, V. & C. R. Co.* 147 Pa. 1, 23 Atl. 392; *United States v. 18 Barrels of High Wines*, 8 Blatchf. 475, Fed. Cas. No. 15,033.

Cross-examination as to irrelevant or incompetent matter does not bring it in issue so as to permit a redirect examination upon it. *Smith v. Dreer*, 3 Whart. 154; *Miller v. Illinois C. R. Co.* 89 Iowa, 567, 57 N. W. 418; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668. *Contra, Dutcher v. Howard*, 15 Wash. 693, 47 Pac. 28. In *Sturgis v. Robbins*, 62 Me. 289, the allowance or rejection of irrelevant testimony on redirect examination under such circumstances was held discretionary with the trial court, and in *Goodman v. Kennedy*, 10 Neb. 270, 4 N. W. 987, the admission of incompetent testimony on redirect examination was held immaterial where substantially the same testimony was brought out on cross-examination.

**Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33; *Robinson v. Dugan* (Cal.) 35 Pac. 902; *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Quigley v. Baker*, 169 Mass. 303, 47 N. E. 1007; *Alderton v. Wright*, 81 Mich. 294, 45 N. W. 968; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Roberts v. Roberts*, 82 N. C. 29; *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226; *Dupree v. Estelle*, 72 Tex. 575, 10 S. W. 666.

Testimony on cross-examination as to part of a conversation does not render admissible on redirect examination the other parts of the conversation on a different subject. *Ballew v. United States*, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263; *Mott v. Detroit, G. H. & M. R. Co.* (Mich.) 79 N. W. 3. Nor does it change the rule with respect to hearsay. *Wagner v. People*, 30 Mich. 384. And the fact that plaintiff in an action for criminal conversation on his cross-examination testified to a conversation regarding his wife and defendant, held with the latter's mother.

does not justify his redirect examination as to the details of the conversation. *Smith v. Merrill*, 75 Wis. 461, 44 N. W. 759.

29. Re-cross-examination.

An opportunity for further cross-examination should be extended where new matter has been elicited upon the redirect examination,¹ but it is proper for the court to restrict such re-cross-examination to the matters inquired into on the redirect.² And where nothing new has been brought out on redirect examination a further cross-examination is not a right of counsel, and its allowance rests in the discretion of the court.³

¹*Wood v. McGuire*, 17 Ga. 303.

²*State v. Southern*, 48 La. Ann. 628, 19 So. 668; *Thornton v. Thornton*, 39 Vt. 122.

³*State v. Hoppiss*, 27 N. C. (5 Ired. L.) 406; *Atlantic & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

But the rejection of an offer to show on recross-examination an important fact omitted upon the cross-examination, the witness being still upon the stand, is an erroneous exercise of this discretion which will not be sustained unless it is apparent that no injury resulted. *Knight v. Cunningham*, 6 Hun, 100.

30. Interpreters; deaf and dumb witnesses.

Where a witness cannot speak the English language, or speaks it very imperfectly, his testimony may properly be given through a sworn interpreter.¹ The accuracy of the interpreter's interpretation may be impeached,² and a witness who has testified through an interpreter may make corrections in his testimony as recorded, if he has been misinterpreted.³

Deaf mutes may give evidence either through an interpreter who can communicate with them by signs,⁴ or by means of written questions and answers;⁵ but the fact that they can read or write does not preclude the use of the former method.⁶

¹*State v. Hamilton*, 42 La. Ann. 1204, 8 So. 304; *Chicago & A. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436; *State v. Severson*, 78 Iowa, 653, 43 N. W. 533; *Houpt v. Houpt*, Wright (Ohio) 156; *Norberg's Case*, 4 Mass. 81. Under the California statute the granting or refusing of an application for an interpreter is vested in the discretion of the court. *People v. Young*, 108 Cal. 8, 41 Pac. 281.

A witness who wrote an agreement offered in evidence which is in a foreign language may translate it without swearing him as an interpreter. *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281. So, a witness may narrate in English the admissions of a party made in a foreign language (*Com.*

v. *Kepper*, 114 Mass. 278), and a party is not bound to resort to an interpreter sworn as such to translate foreign words testified to by a witness which he claims to have been incorrectly translated by the witness. *Thon v. Rochester R. Co.* 29 N. Y. Supp. 675.

Where the oath is administered to witnesses through an interpreter it is not necessary that the clerk should repeat the oath to him as often as he is called upon to administer it to a witness. *Com. v. Jonegras*, 181 Pa. 172, 37 Atl. 207.

As to the admissibility of evidence when given through an interpreter, see note to *Com. v. Vose* (Mass.) 17 L. R. A. 813.

**Schnier v. People*, 23 Ill. 17.

But the fact that an interpreter took counsel as to the correctness of the interpretation with other persons not sworn does not render the evidence incompetent where the interpretation is given under oath. *United States v. Gibert*, 2 Sumn. 90, Fed. Cas. No. 15,204.

**Erickson v. Milwaukee, L. S. & W. R. Co.* 93 Mich. 414, 53 N. W. 393.

**Ruston's Case*, 1 Leach C. L. 408; *Snyder v. Nations*, 5 Blackf. 295.

The interpreter need not be an expert if it is satisfactorily shown that he can correctly interpret the meaning of the communication required. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *State v. Weldon*, 39 S. C. 318, 24 L. R. A. 126, 17 S. E. 688.

A deaf and dumb person may be appointed as an additional interpreter to interpret between the deaf and dumb witness and the original interpreter who can declare the testimony orally. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695.

**Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384.

**State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. DeWolf*, 8 Conn. 93, 2 Am. Dec. 90.

For extended discussion of deaf and dumb persons as witnesses, see note to *State v. Weldon* (S. C.) 24 L. R. A. 126.

VIII.—IMPEACHMENT AND CORROBORATION OF WITNESSES.

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| <p>A. IMPEACHMENT BY PROOF OF INCONSISTENT STATEMENTS OR ACTS.</p> <ol style="list-style-type: none">1. Laying foundation.2. Laying foundation as to statements in writing.3. Sufficiency of foundation.4. Inconsistent statements or conduct.5. Form of question to impeaching witness. <p>B. IMPEACHMENT BY PROOF OF HOSTILITY, BIAS, OR INTEREST IN THE ACTION.</p> <p>C. IMPEACHMENT BY PROOF AS TO CHARACTER OR REPUTATION AND FACTS AFFECTING THEM.</p> <ol style="list-style-type: none">1. General reputation for truth and veracity or moral character. | <ol style="list-style-type: none">2. Foundation, questioning impeaching witness.3. Place and time of reputation.4. Conviction.5. Indictment, etc.6. Specific acts or offenses or line of conduct. <p>D. IMPEACHMENT AS TO COLLATERAL AND IMMATERIAL OR IRRELEVANT MATTER BROUGHT OUT ON CROSS-EXAMINATION.</p> <p>E. IMPEACHMENT OF ONE'S OWN WITNESS.</p> <p>F. CORROBORATION OF IMPEACHED WITNESS.</p> |
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A. IMPEACHMENT BY PROOF OF INCONSISTENT STATEMENTS OR ACTS.

A witness may be impeached by cross-examination¹ tending to discredit him by his own answer, by proof of his statements or acts inconsistent with his testimony on the trial, by proof of hostility, bias, or interest, and by proof as to character or reputation affecting the credibility of his evidence. And in a few states a witness may under the statutes be impeached by contradictory evidence.²

¹As to cross-examination to test credibility, see *ante*, Division VII. § 27.

²California, Idaho, Kentucky, Georgia, Montana, Oregon. This would

seem to be purely rebutting evidence used for that purpose, as, with the exception of one state, impeachment by proof of the witness's inconsistent statements is also provided for.

1. Laying foundation.

A foundation must be laid for impeaching a witness by proof of his inconsistent statements or acts by interrogating him with reference thereto,¹ and calling his attention to the time, place, person to whom, or other essential circumstances of the making thereof,² so as to give him an opportunity to explain them;³ and in the absence of such foundation evidence thereof is inadmissible.⁴ But a predicate cannot be based upon irrelevant or immaterial evidence.⁵

¹*Times Pub. Co. v. Carlisle*, 94 Fed. Rep. 762, 36 C. C. A. 475; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18; *Thompson v. Wertz*, 41 Neb. 31, 59 N. W. 518; *Cabell v. Holloway*, 10 Tex. Civ. App. 1307, 31 S. W. 201; *Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222, 35 L. ed. 715, 11 Sup. Ct. Rep. 914. And see further statutes in Arkansas, California, Florida, Idaho, Iowa, New Mexico, and Oregon; and also special provisions in Florida, Vermont, and Massachusetts as to party's own witness. And the court may in its discretion permit the recalling of a witness of an adverse party for the purpose of laying a foundation for impeaching him where such foundation was not laid upon cross-examination. *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001. And see also *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510. But that it is not necessary to call his attention thereto, see *Wilkins v. Babbershall*, 32 Me. 184; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Cook v. Brown*, 34 N. H. 460; *Tucker v. Welsh*, 17 Mass. 160; *Gould v. Norfolk Lead Co.* 9 Cush. 338, 57 Am. Dec. 50. See also *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893.

²*Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86; *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L. R. A. 781, 39 N. E. 241; *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87; *Watson v. St. Paul City R. Co.* 42 Minn. 46, 43 N. W. 904; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; *Dunlap v. Richardson*, 63 Miss. 447; *Bartlett v. Cheesebrough*, 32 Neb. 339, 49 N. W. 360; *Hunter v. Gibbs*, 79 Wis. 70, 48 N. W. 257; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Bogart v. Delaware, L. & W. R. Co.* 72 Hun, 412, 25 N. Y. Supp. 175; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126. See also *Smith v. Jones*, 11 Tex. Civ. App. 18, 31 S. W. 306; *Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387. And where the statement or declaration has been alleged to have been made within a year of the date of trial it is held in *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86, that the time ought to be stated within a few days or weeks, or at most, a month, of the time proved.

The matter of discrediting witness by such proof without first calling attention thereto is held to rest in the sound discretion of the court in *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22 (evidence not admitted).

In Massachusetts it is not necessary to call attention to the occasion of such statement and give the witness a chance to explain. *Allen v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893. But where it is sought to show that one's own witness has made contradictory statements, the rule is different. Mass. Pub. Stat. chap. 169, § 22.

Party to suit:

The rule is generally stated that where a party to a suit becomes a witness therein he may be impeached by proof of statements made by him without a foundation being laid therefor, and it would seem to be on the ground that the admissions of a party are always admissible in evidence against him. But in *Conway v. Nicol*, 34 Iowa, 533, it is said that while the declaration out of court of a party may be introduced as an admission of fact, yet in order that such declaration may operate as an impeachment of his character as a witness his attention must be directed to the time, place, and person involved in the supposed contradiction. And in *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340, deciding that a witness cannot be impeached by proof of statements out of court in conflict with his testimony in chief without laying a foundation therefor by calling his attention to the time and place when and where the statements were made, although he is a party to the action, the court says that the rule seems to be different when the proposed evidence is in the nature of an admission of a party to the record and it is not intended for impeaching purposes. So, in *Davis v. Franke*, 33 Gratt. 413, it is held that a witness, although a party to the suit, cannot be discredited by proof that he requested the impeaching witness to testify for him, without calling his attention thereto. And in *Martineau v. May*, 18 Wis. 54, deciding that failure to first interrogate a party to a suit who testified in his own behalf, as to an attempt by him to procure a witness to give false testimony, before the admission of such testimony for the purpose of impeachment, is not error justifying a reversal where the witness sought to be discredited did not depart the court but was afterwards recalled and testified further on the subject, it is said that where such evidence is admitted merely for the purpose of impeachment it is perhaps the established rule that the witness sought to be impeached must first be interrogated as to the fact. That no foundation is necessary, see *Coffin v. Bradbury* (Idaho) 35 Pac. 715; *Sanders v. Clifford*, 72 Mo. App. 548; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350; *Kreiter v. Bomberger*, 82 Pa. 59; *Collins v. Mack*, 31 Ark. 684; *Lucas v. Flinn*, 35 Iowa, 9; *Robbins v. Downey*, 45 N. Y. S. R. 279, 18 N. Y. Supp. 100. Where he is afforded full opportunity to testify to such statements in the regular course of the trial, see *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493. But a next friend of minors is not a party to the suit in such sense that her admissions out of court are admissible to impeach her testimony, unless a proper foundation is laid.

**Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Hamm-*

mond v. Dike, 42 Minn. 273, 44 N. W. 61; *Dunlap v. Richardson*, 63 Miss. 447; *Hunter v. Gibbs*, 79 Wis. 70, 48 N. W. 257. See statutes of California, Idaho, Indian Territory, Iowa, and Wyoming.

▲ witness admitting inconsistent statements or acts is entitled to state in explanation thereof how, why, and under what circumstances made. *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272. And letters having been put in evidence to impeach a witness the addressee's answers are admissible in explanation. *Ibid.* And likewise where a deposition has been admitted to impeach, without giving a witness an opportunity to explain, the testimony of others is admissible for that purpose. *Ibid.* So, a bill of sale absolute on its face having been introduced to impeach a witness's testimony as to the ownership of property, he may in explanation testify that although absolute on its face it was in fact intended as security. *Peck v. Manning*, 99 N. C. 157, 5 S. E. 743. And a witness interrogated as to a conversation to lay a foundation for impeachment is entitled to give the whole thereof, so far as pertinent. *Savannah, F. & W. R. Co. v. Holland* (Ga.) 9 S. E. 1040. So, a witness impeached by the introduction of evidence as to a conversation should, on being recalled, be allowed to state what that conversation was so as to show that there was a misunderstanding and that his statements at that time were not inconsistent with his testimony on the trial. *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18. A witness who on cross-examination has been asked as to an answer in garnishment proceedings to lay a foundation for impeaching his credibility, must be permitted on redirect examination to explain such answer. *Smith v. Traders Nat. Bank*, 82 Tex. 368, 17 S. W. 779.

**Mutter v. I. X. L. Lime Co.* (Cal.) 42 Pac. 1068; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644; *Sharp v. Hicks*, 94 Ga. 624, 21 S. E. 208; *Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850; *Perishable Freight Transp. Co. v. O'Neill* 41 Ill. App. 423; *North Chicago Street R. Co. v. Cottingham*, 44 Ill. App. 46; *Seckel v. York Nat. Bank*, 57 Ill. App. 579; *Richmond Bros. v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344; *Standard Life & Acci. Ins. Co. v. Tinney*, 73 Miss. 726, 19 So. 662; *Fulton v. Hughes*, 63 Miss. 61; *Bates v. Holladay*, 31 Mo. App. 162; *Whceler v. Van Sickle*, 37 Neb. 651, 56 N. W. 196; *Wylar v. Rothschild*, 53 Neb. 566, 74 N. W. 41; *Morris v. New York, O. & W. R. Co.* 148 N. Y. 88, 42 N. E. 410; *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Vaughn Mach. Co. v. Quintard*, 37 App. Div. 368, 55 N. Y. Supp. 1114; *Weymouth v. Broadway & S. Ave. R. Co.* 2 Misc. 506, 22 N. Y. Supp. 1047; *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191. See also *infra*, § 2, as to laying foundation for written statements. Such a foundation must be laid either before or supplied by examination of a witness subsequently. *Stone v. Northwestern Sleigh Co.* 70 Wis. 585, 36 N. W. 248. So, a witness whose testimony has been taken by deposition or commission cannot be impeached by proof of his inconsistent statements or declarations to which his atten-

tion was not called on such examination. *Monroeville v. Weihl*, 2 Ohio Dec. 343; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843; *Fitch v. Kennard*, 46 N. Y. S. R. 271, 19 N. Y. Supp. 468. But in *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516, it is held that a witness whose testimony is given on a trial by deposition may be impeached by the introduction in evidence of a letter written and signed by him which tended to contradict his testimony as to material facts, without calling his attention to the declaration therein. A witness may be impeached by evidence of declarations out of court contrary to what he has testified to on the witness stand, although no foundation was laid therefor in his cross-examination, where no objection is made on that ground. *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606.

**Beall v. Folmar* (Ala.) 26 So. 1; *Griel v. Solomon*, 82 Ala. 85, 2 So. 322. See *infra*, subdivision D, as to contradiction as to immaterial matters brought out on cross-examination.

2. Laying foundation as to statements in writing.

To permit the introduction in evidence of written inconsistent statements of a witness to impeach him a foundation must have been laid therefor.¹

¹*Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416 (answer in previous suit); *Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850 (affidavit); *Travelers Preferred Acci. Asso. v. McKinney*, 57 Ill. App. 141 (affidavit); *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687 (affidavit); *Hanscom v. Burmood*, 35 Neb. 504, 53 N. W. 371 (former testimony); *Carder v. Primm*, 52 Mo. App. 102 (former testimony); *Georgia R. & Bkg. Co. v. Smith*, 85 Ga. 530, 11 S. E. 859 (brief of former testimony); but see below as to statement under oath in Georgia. Nor can failure to testify on former trial as to facts testified to on a second trial be shown at the latter trial for the purpose of impeaching the witness without showing that he was interrogated on the first trial as to such facts, or had his attention directed thereto. *Wheeler v. Van Sickle*, 37 Neb. 651, 56 N. W. 196; *Bradford v. Barclay*, 39 Ala. 33 (deposition in same case); *Howe Mach. Co. v. Clark*, 15 Kan. 492 (deposition); *Samuels v. Griffith*, 13 Iowa, 103 (prior deposition to impeach subsequent deposition). So, a deposition in another action was held not admissible without foundation laid, in *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709. And letters written by a witness are not admissible where the witness's attention is not called to them on his examination. *Root v. Borst*, 142 N. Y. 62, 36 N. E. 814, Reversing 47 N. Y. S. R. 799, 20 N. Y. Supp. 189; *Burleson v. Collins* (Tex. Civ. App.) 28 S. W. 898; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *Richmond v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; but written statements are held, in *Doud v. Donnelly*, 59 Hun, 615, 12 N. Y. Supp. 396, to be admissible for impeachment without first calling the witness's attention to the time and place where they were made, if identified as genuine by the witness after examination. And in *McDaneld v. McDaneld*, 136

Ind. 603, 36 N. E. 286, it is held not error to permit a letter to be introduced for the purpose of impeachment, where no objection was made to it on the ground that no proper foundation had been laid for impeaching the witness.

After admitting that a witness, if present, would testify as stated in the affidavit, in order to avoid a continuance, he cannot be impeached by a letter written by him, because no foundation can be laid for the impeaching evidence. *North Chicago Street R. Co. v. Cottingham*, 44 Ill. App. 46.

In *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516, it is held that a witness whose testimony is given on the trial by deposition may be impeached by the introduction in evidence of a letter written and signed by him which tends to contradict him as to material matters, without calling his attention to the declarations therein. But see *Monroeville v. Weihl*, 2 Ohio Dec. 343; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843; *Fitch v. Kennard*, 46 N. Y. S. R. 271, 19 N. Y. Supp. 468; *Seckel v. York Nat. Bank*, 57 Ill. App. 579.

Other written statements held inadmissible without foundation: *Masted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Kirchner v. Laughlin*, 6 N. M. 300, 28 Pac. 505; *Weymouth v. Broadway & S. Ave. R. Co.* 2 Misc. 506, 22 N. Y. Supp. 1047; *Galveston, H. & S. A. R. Co. v. Briggs*, 4 Tex. Civ. App. 515, 23 S. W. 503.

But a contract for the construction of a sewer by which the contractor agreed to save the city from all damage because of injuries received by the work is held admissible to show interest of the contractor as a witness for the city in an action for personal injuries caused by defective condition of the street, without any cross-examination of such witness and denial of interest, as affecting his credibility. *Aurora v. Scott*, 82 Ill. App. 616. And that it is not necessary, in order to introduce a former deposition of a witness or answers to interrogatories taken by commission as impeaching evidence, to lay a foundation therefor by interrogating him, as to whether he made it, stating the time and place, etc., see *Williams v. Chapman*, 7 Ga. 467; *Bryan v. Walton*, 14 Ga. 185; *Molyneaux v. Collier*, 30 Ga. 731; and the Georgia Code dispenses with such preliminary where the statements of a witness are written and have been made under oath in some judicial proceeding.

That where the statements are in writing it is necessary to show the same to the witness before cross-examining him in reference thereto, see *Ecker v. McAllister*, 45 Md. 291; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597; *Stamper v. Griffin*, 12 Ga. 450, 65 Am. Dec. 628 (letter, but as to statements under oath in Georgia see cases cited *supra*); *Newcomb v. Griswold*, 24 N. Y. 298. And in deciding that in laying a foundation to impeach a witness he cannot be asked to state what he thought he made oath to concerning a certain matter in his petition, the court in *Callanan v. Shaw*, 24 Iowa, 441, says that it might have been proper to have stated the particular matter and then ask him if he made oath thereto, or the better, and probably the correct, practice would have been to have shown the witness the petition and then ask him if he

had sworn to it. So, in *Romertze v. East River Nat. Bank*, 49 N. Y. 577, deciding that a sufficient foundation is laid for the introduction of the deposition of a witness to impeach him by showing it to him and by his statement that he signed it and that it was read over to him before he signed it, it is said that it would not have been competent to have repeated particular sentences and ask if he testified to them, because the paper was the best evidence of what it contained. See further statutory provisions requiring written statement to be shown, in Arkansas, California, Georgia, Idaho, Indian Territory, Kentucky, Montana, Oregon, and in New Mexico (may cross-examine without showing, but if it is intended to contradict the witness thereby his attention must be called to the parts of the writing to be used therefor).

3. Sufficiency of foundation.

In laying the predicate for impeachment it is not necessary that the exact time, place, or words be given, but it is sufficient if these be named with reasonable certainty and sufficient distinctness to fully call to the attention of the witness the statements it is claimed he had made.¹

¹*Donahoo v. Scott* (Tex. Civ. App.) 30 S. W. 385; *Mayer v. Appel*, 13 Ill. App. 87; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Union Parish School Board v. Trimble*, 33 La. Ann. 1073; *Bennett v. O'Byrne*, 23 Ind. 604. But a proper foundation is not laid for impeaching a witness by proof of certain statements, where such witness's attention was not called to the statements made nor the time of making the same, but was asked if she had had a conversation with a certain person in reference to the matter in question. *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

A sufficient foundation for impeachment by proof of contradictory statements is laid where the whole of the cross-examination makes known to the witness the time and place where and to whom the statements were made, although any one question asked may not have sufficiently shown such facts. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377. And the impeaching question need not negative the presence of other persons than the witness and the person to whom the witness, as disclosed by the question, addressed himself, or state affirmatively that such person was present. *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372. Questions propounded which call attention to the time and place and the specific statements claimed to have been made are sufficiently specific. *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001.

A question which elicits an answer that the witness did not see the impeaching witness for over a year before a certain occurrence, during which period the alleged conversation took place, and that she never made a certain statement to such witness, lays a sufficient foundation for the introduction of the testimony of the impeaching witness affirming the making of such statement. *Hertz v. Minzesheimer*, 12 Misc. 58, 33 N. Y. Supp. 48.

A sufficient foundation for a question as to whether a witness did not on a certain occasion state to the impeaching witness that the insured's books were wrong, and that he had no such stock as he claimed, and that his charges were erroneous, is laid by testimony of the former witness that he did not remember having any conversation specially with the impeaching witness and his denial of stating that he had told insured his books were wrong, and that he had no such stock as he claimed, and that he never said anything to the impeaching witness about the stock being overestimated by the insured. *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13. And a question whether a witness did not make certain statements to a person named at or before the time of the last trial of the cause, in a certain city and during a certain month and year, is sufficient to advise him of the declarations on which he is to be impeached and when, to whom, and the occasion on which they were made. *Spohn v. Missouri P. R. Co.* 122 Mo. 1, 26 S. W. 663. But a sufficient foundation is not laid if the witness's attention is not called to the place at all, and to the time only as some time in a designated month or thereabouts, and the impeaching question differs materially in subject-matter from that asked the witnesses sought to be impeached. *Spohn v. Missouri P. R. Co.* 116 Mo. 617, 22 S. W. 690. So, a former inconsistent declaration was held inadmissible in *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86, where the witness's attention was called thereto as having been made in July of a certain year, and the offer is to prove such a declaration some time during the summer of that year. And where the witness's examination was limited to a conversation with the impeaching witness during a certain year, testimony which related to a conversation in some other year was excluded in *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909. But in *Kirshbaum v. Hanover F. Ins. Co.* 16 Ind. App. 606, 45 N. E. 1113, the fixing of the time at "about one year ago" was held sufficient where the exact time could not be fixed. Calling the attention of a witness to contradictory statements as made shortly after a previous trial is not sufficient to lay a foundation for impeachment by proof of such statements as made shortly before such previous trial. *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190. And a sufficient foundation is not laid for the admission of impeaching evidence by testimony as to a conversation with the witness sought to be impeached, where the latter's attention was called not to the conversation so testified to, but to a subsequent conversation between the same parties. *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577. Asking a witness if he was ever arrested for fast driving in a certain city does not lay a sufficient foundation for his impeachment by proof that he pleaded guilty to a violation of an ordinance against fast driving in that city, before a justice of the peace on a certain day and year. *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126.

4. Inconsistent statements or conduct.

A witness may be impeached by proof as to a material matter,¹ of subsequent² or prior contradictory statements³ which he denies mak-

ing, or of which he testifies he has no recollection or does not remember;⁴ but where he admits having made such statements further evidence is inadmissible, as such admission is sufficient proof thereof.⁵ Facts or conditions contradictory of the witness's testimony are not always so admissible.⁶ And usually a mere former opinion expressed by a witness which is inconsistent with the facts or the opinion which the facts he testifies to tend to establish, is inadmissible for the purpose of impeachment;⁷ but his inconsistent acts or conduct are admissible for that purpose.⁸

⁴*Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *St. Louis Gaslight Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652, 43 N. W. 660. But not as to an immaterial or irrelevant matter. *Louisville & N. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117; *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180; *Carder v. Primm*, 60 Mo. App. 423; *Ern v. Rubinstein*, 72 Mo. App. 337; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213. See also *infra* as to collateral matter brought out on cross-examination.

⁵Where a witness admits that he testified to matters of which he knew nothing the opposite party may, after recalling him and asking him as to such admissions, impeach him by proof thereof, although it was after he was discharged. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510. But not until a proper foundation is laid therefor by interrogating him in regard to the statement. *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641. See also *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606 (hostility). But that a party cannot directly discredit his own witness by proof of a subsequent contradictory statement out of court, see *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499. As to impeachment of one's own witness by proof of contradictory statements, see *infra*, subdivision E, note 6.

⁶See the statutory provisions in various states. *Leahey v. Cass Ave. & F. G. R. Co.*, 97 Mo. 165, 10 S. W. 58; *First Nat. Bank v. Atlanta Rubber Co.*, 77 Ga. 781; *Milligan v. Butcher*, 23 Neb. 683, 37 N. W. 596; *Spohn v. Missouri P. R. Co.* 101 Mo. 417, 14 S. W. 880; *McAfee v. Montgomery*, 21 Ind. App. 196, 51 N. E. 957; *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511; *Western U. Teleg. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699; *Milford v. Veazie* (Me.) 6 New Eng. Rep. 646, 14 Atl. 730; *Jones v. New York L. Ins. Co.* 168 Mass. 245, 47 N. E. 92; *Re Hardy*, 59 Mich. 352, 26 N. W. 539; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Sprague v. Bristol*, 63 N. H. 430; *Palmeri v. Manhattan Elev. R. Co.* 60 Hun, 579, 14 N. Y. Supp. 468; *Effray v. Masson*, 28 Abb. N. C. 207, 18 N. Y. Supp. 353; *Barrett v. Smith*, 47 N. Y. S. R. 936, 19 N. Y. Supp. 1020; *Post Pub. Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. Rep. 530, 8 C. C. A. 201; *Woodward v. Blue*, 103 N. C. 109, 9 S. E. 492; *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424; *Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Edwards v. Osman*, 84 Tex. 656, 19 S. W. 868; *Bonner v. Mayfield*, 82

Tex. 234, 18 S. W. 305; *Tunell v. Larson*, 37 Minn. 258, 34 N. W. 29; *Hertz v. Minzesheimer*, 12 Misc. 58, 33 N. Y. Supp. 48, Affirming 10 Misc. 779, 30 N. Y. Supp. 805; *Bruner v. Nisbett*, 31 Ill. App. 517; *Handy v. Canning*, 166 Mass. 107, 44 N. E. 118 (against title); *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180 (admission); *Swift v. Withers*, 63 Minn. 17, 65 N. W. 85 (ownership); *Immaculate Conception Church v. Shaffer*, 88 Hun, 335, 34 N. Y. Supp. 724 (declaration as to easement); *Wilson v. Wilson*, 137 Pa. 269, 20 Atl. 644 (declaration); *Heintz v. Caldwell*, 16 Ohio C. C. 630 (declarations, affirmance of facts); *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741 (whether of fact or opinions); *Donahoo v. Scott* (Tex. Civ. App.) 30 S. W. 385 (duress); *Re Snelling*, 136 N. Y. 515, 32 N. E. 1006 (pay offered for testimony); *Doherty v. Lord*, 8 Misc. 227, 28 N. Y. Supp. 720 (cause of accident); *Hess v. Redding*, 2 Ind. App. 199, 28 N. E. 234 (pay offered for testimony); *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64; *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252 (witness denying statement of no knowledge of "particulars" of the accident, impeachable by proof of statements of no knowledge of "details"); *Ludtke v. Hertzog*, 30 U. S. App. 637, 72 Fed. Rep. 142, 18 C. C. A. 487; *Tolman v. Smith*, 43 Ill. App. 562. But evidence of contradictory statements for the purpose of impeachment is properly excluded where the impeaching witness is unable to remember which of two witnesses made such statement. *Southern R. Co. v. Williams*, 113 Ala. 620, 21 So. 328. And a witness whose credibility has been attacked by the introduction in evidence of the record of her conviction of a crime and who has given no testimony in explanation thereof, cannot be cross-examined in regard to that crime and then impeached by showing that she had made statements contradictory to those made on such cross-examination. *Cole v. Lake Shore & M. S. R. Co.* 95 Mich. 77, 54 N. W. 638. Evidence of contradictory statements is admissible for impeachment, although not admissible as evidence of the truth of such statements. *Rechow v. American Cent. Ins. Co.* 65 Mo. App. 52; *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71; *Union Coal Co. v. Edman*, 16 Colo. 438, 27 Pac. 1060. That declarations of an agent are admissible for the purpose of impeaching him as a witness, although inadmissible to affect his principal, see *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731; *Sowles v. Carr*, 70 Vt. 630, 41 Atl. 581. And see also *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Thornton v. Savage*, 120 Ala. 449, 25 So. 27. And a witness testifying as to testator's sanity may be impeached by proof of inconsistent statements. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Re O'Connor*, 118 Cal. 69, 50 Pac. 4. And a physician whose testimony tends to show that in his opinion deceased was competent to make a will and denies having stated otherwise may be contradicted by showing that he has stated that deceased was, in his opinion, not competent to make a will. *Re McCarthy*, 48 N. Y. S. R. 315, 20 N. Y. Supp. 581. But the declaration of a witness that he had never seen testatrix since her husband died, when she was fit to make a will, is not admissible to contradict his testimony that during that time she had been at his house for several months, and that he saw no change in her intelligence,

also relating the conversations indicating that she was of sound mind, as such testimony does not show that he ever thought she was fit to make a will. *Williams v. Spencer*, 150 Mass. 346, 5 L. R. A. 790, 23 N. E. 105.

A witness for defendant in an action for personal injuries may be impeached by proof of contradictory statements relative to the accident. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Jamison v. Illinois C. R. Co.* 63 Miss. 33; *Dampman v. Pennsylvania R. Co.* 166 Pa. 520, 31 Atl. 244; *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725; *McClellan v. Ft. Wayne & B. I. R. Co.* 105 Mich. 101, 62 N. W. 1025; *Missouri, K. & T. R. Co. v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245; *Missouri, K. & T. R. Co. v. Milan*, 20 Tex. Civ. App. 688, 50 S. W. 417; *Heddles v. Chicago & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115. Damage by fire. *Jamieson v. New York & R. Beach R. Co.* 11 App. Div. 50, 42 N. Y. Supp. 915 (statement as to spark arrester).

Testimony by persons on a steamer of contradictory statements and admissions made by some of the crew of a schooner, who had been taken on board the steamer after a collision, will not be sufficient to impeach the latter, unless the proof is of a clear and unmistakable character. *The Nessmore*, 41 Fed. Rep. 437.

A physician testifying for plaintiff in an action for personal injuries may be impeached by evidence of inconsistent statements as to the injury. *McMahon v. Salem*, 25 App. Div. 1, 49 N. Y. Supp. 310; *Liddle v. Old Lowell Nat. Bank*, 158 Mass. 15, 32 N. E. 954. And a witness in a suit for personal injuries, who first found plaintiff after the accident and described the time and place of finding her, may be contradicted by showing that a few days later he made inconsistent statements to another witness when they were at the place of the accident. *Judd v. Claremont*, 66 N. H. 418, 23 Atl. 427.

Written statements:

Letters contradictory of the testimony of writer are admissible to impeach him. *Western Mfrs.' Mut. Ins. Co. v. Boughton*, 136 Ill. 317, 26 N. E. 591, Affirming 37 Ill. App. 183; *Dick v. Marble*, 155 Ill. 137, 39 N. E. 602; *Anthony v. Jones*, 39 Kan. 529, 18 Pac. 519; *Sharp v. Hall*, 86 Ala. 110, 5 So. 497; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530; *Foster v. Worthing*, 146 Mass. 607, 16 N. E. 572 (where the tendency thereof as a whole is to contradict his testimony, although there may be no contradiction in express terms). But a letter containing nothing in conflict with his testimony or deposition is inadmissible. *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22.

Tax returns setting forth the value of stock of a water company whose plant has been purchased by the city may in proceedings to determine the value of such plant be identified and put in by the city to contradict the officer making such returns who has testified for the company, where they tend to show a smaller value of the property than that given by him on the stand. *Newburyport Water Co. v. Newburyport*,

168 Mass. 541, 47 N. E. 533. But it is held in *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534, that a tax list duly signed and sworn to is inadmissible to contradict the testimony of the owner of the property as to its value, in an action upon an insurance policy.

Plaintiff is entitled to show by an account of the injury for which suit is brought, prepared by an employee of defendant and in defendant's possession at and before the trial, that one of defendant's witnesses had made a statement upon another occasion inconsistent with his testimony upon the trial. *Freel v. Market Street Cable R. Co.* 97 Cal. 40, 31 Pac. 730.

Depositions or affidavits of witnesses are admissible to impeach them by inconsistent statements therein. *New York, P. & N. R. Co. v. Kellam*, 83 Va. 851, 3 S. E. 703 (deposition); *Southern Kansas R. Co. v. Painter*, 53 Kan. 414, 36 Pac. 731 (deposition, although not filed with the claim and not admissible as a deposition, may be read in evidence to contradict); *Zebley v. Storey*, 117 Pa. 478, 12 Atl. 569 (deposition); *Fein v. Covenant Mut. Ben. Asso.* 60 Ill. App. 274 (affidavit); and that the admission of the entire affidavit for the purpose of showing inconsistent statements of the witness is not objectionable if expressly limited to that purpose, see *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850. But where three trials of the same case have been had, in each of which the same deposition of the same witness has been given in evidence, in the taking of which he was cross-examined, and on those trials no reference was made to a former deposition of his in another suit, and no attempt made to call his attention to it, and by his death subsequently he is placed beyond the power of explanation, then on the fourth trial of the case contradictory declarations of his in such former deposition cannot be used to impeach his testimony. *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116. And where one introducing interrogatories omits certain answers which are inadmissible in his behalf because they purport to state the contents of a written instrument which is in evidence, the other party cannot introduce such answers merely to discredit the witness by showing that these answers are contrary to the facts proved by the writing itself. *Maynard v. Cleveland*, 76 Ga. 52. And an affidavit made by an agent of defendant railroad company, alleging that he did not know the origin of the fire by which plaintiff's cotton sued for was destroyed, but that he supposed it was set on fire by a passing engine of defendant, is inadmissible to impeach him as a witness, where he testifies on the trial that he did not know the origin of the fire. *Houston & T. O. R. Co. v. Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595.

Pleadings, see *Barrett v. Featherstone*, 89 Tex. 567, 36 S. W. 245 (original answer, although superseded by amended answer); *Re O'Connor*, 118 Cal. 69, 50 Pac. 4 (original answer, although superseded by amended answer); *Smith v. Traders Nat. Bank*, 74 Tex. 457, 12 S. W. 113 (answer in another proceeding); *Floyd v. Thomas*, 108 N. C. 93, 12 S. E. 740 (answer in another action).

After plaintiff has stricken out items from his bill of particulars, evidence

contradicting his testimony in relation to such items is not admissible for impeachment. *McDonald v. McDonald*, 67 Mich. 122, 34 N. W. 276.

The record of a board of selectmen showing their deliberations in agreeing on the question of the amount of damages to land by the laying out of a street is held inadmissible in *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547, for the purpose of contradicting a witness who testifies as to such damage and who was a member of such board, as in such bodies there must ordinarily be compromises of individual opinion in coming to an agreement. But in *Dawson v. Pittsburgh*, 159 Pa. 317, 28 Atl. 171, a report of viewers as to damages to abutting property by the change of grade of the street was held admissible to contradict one of such viewers whose testimony as a witness differed from the estimate given in such report. And in *Munkwitz v. Chicago, M. & St. P. R. Co.* 64 Wis. 403, 25 N. W. 438, it is held that a witness may on cross-examination be asked as to the amount of an award made by commissioners, of whom he was one, for the purpose of affecting the weight of his testimony, where he has given an opinion adverse to such award.

▲ statement signed by a witness which contradicts his testimony is admissible to impeach him. *Baumer v. French*, 8 N. D. 319, 79 N. W. 340; *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471; *Hughes v. Delaware & H. Canal Co.* 176 Pa. 254, 35 Atl. 190 (although the body thereof was written by another person); *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566 (not inadmissible when accuracy denied, because procured by agent of party offering it without notice to the other party); *Kaufman v. Schoeffel*, 46 Hun, 574. And a written statement is admissible for impeachment which is admitted by the witness to have been made by him, although not signed or sworn to. *Cross v. McKinley*, 81 Tex. 332, 16 S. W. 1023. See also *Schnitzer v. Gordon*, 28 App. Div. 341, 51 N. Y. Supp. 152 (note); *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649 (judgment).

▲ pauper affidavit to appeal a case, and a bond of security given thirty days later to dissolve a garnishment in the same case, are not admissible as affecting the credibility of appellant as a witness in his own behalf, as such evidence is not proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case. *Harrison v. Langston*, 100 Ga. 394, 28 S. E. 162.

Former testimony:

Former testimony of a witness is admissible to impeach him as to contradictory statements. *Kerr v. Hodge*, 39 Ill. App. 546; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L. R. A. 696, 25 N. E. 799; *Tobin v. Jones*, 143 Mass. 448, 9 N. E. 804; *Georgia R. & Bkg. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794 (admission in testimony of falsity of affidavit made). And proof of the claim and evidence introduced by plaintiff on a former trial, contradictory of her present testimony, is admissible to discredit her. *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273. But it is not admissible for that purpose unless it relates to some matter material to the issue on trial. *Steinhardt v. Bell*, 80 Ala. 208. And evidence is inadmissible to discredit a witness, that on a former trial, after he had

testified to being present on a specified occasion, other witnesses testified that he was not present. *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87. How proved: By member of coroner's jury as to testimony thereat. *Maxwell v. Wilmington City R. Co.* 1 Marv. (Del.) 199, 40 Atl. 945. By stenographer who took the testimony: *Pennsylvania Co. v. Trainer*, 12 Ohio C. C. 66 (although at the time he testifies he has no independent recollection thereof, but remembers and testifies that at the time his notes were correctly taken and contained all the witness's evidence); *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621 (although he has no recollection thereof independent of his notes which he testifies he took at the time). *Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653. But not by the minutes of the testimony. *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638. Nor by the transcript of the reporter's notes. *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650 (certified copy of transcript); but, contra, see *Hibbard v. Zenor*, 82 Iowa, 505, 49 N. W. 63, under statute providing that a duly certified transcript of shorthand notes of evidence in a case shall be admissible in any case in which material and competent to the issue, with the same force and effect as depositions. But a witness cannot be impeached by his testimony as shown by the statements of facts on the former appeal and the charge of the court on a former trial. *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054. Nor by a bill of exceptions containing his testimony at a former trial. *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L. R. A. 687, 23 N. E. 973; *Boyd v. First Nat. Bank*, 25 Iowa, 255; but, contra, see *Baylor v. Smithers*, 1 T. B. Mon. 6. Nor is a case made on a former trial admissible for the purpose of impeaching a witness on another trial by showing what he swore to upon the previous trial. *Neilson v. Columbian Ins. Co.* 1 Johns. 301. But an abstract in a suit admitted by a witness to have been prepared by him is admissible as bearing upon his testimony and the weight to be given it, where the recitals therein are in conflict with his testimony, or his memory as to the matters recited appears to be defective. *Rosenthal v. Bilger*, 86 Iowa, 246, 53 N. W. 255.

**Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345; *Kelly v. Cohoes Knitting Co.* 8 App. Div. 156, 40 N. Y. Supp. 477; *Heddles v. Chicago & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115; *Allen v. Conn* (Tex. Civ. App.) 37 S. W. 192; *Gregg Twp. v. Jamison*, 55 Pa. 468. And a witness who testifies that he did not make a given statement may be impeached by showing that he has made such statement, although he first testifies that he has no recollection of making such statement. *Moeller v. Karhoff*, 98 Iowa, 726, 68 N. W. 446. And also that where the statement is not distinctly admitted, proof may be given, see Florida and New Mexico statutes. And that where a witness on cross-examination as to inconsistent statements says he does not recollect having made the statements, he may be impeached by proof thereof the same as if he denied the statements, see Indiana statutes.

**Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979 (signed statement); *Atchison, T. & S. F. R. Co. v. Lechan*, 149 Ill. 202, 36 N. E. 1036, Affirm-

ing 47 Ill. App. 66 (former testimony); *Winter v. Judkins*, 106 Ala. 259, 17 So. 627 (mortgage).

•*Vierling v. Iroquois Furnace Co.* 68 Ill. App. 643, Affirmed in 170 Ill. 189, 48 N. E. 1069 (witness cannot be impeached as to testimony that he told an agent that iron sold by plaintiff was giving universal satisfaction elsewhere, by showing that the iron did not give such satisfaction); *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414 (witness accounting for his presence at a particular point by statement that he had gone there to vote at primary cannot be contradicted by showing that his residence was not in the same polling precinct as the point in question, where he does not testify that he lived in the precinct in which primary held); *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341 (witness testifying to declaration as to boundary by testator when they were together at the point in question when a fence was burned cannot be impeached by proof that on the night of that day testator asked how much fence was burned). See also *Moore v. Powers Bros.* 16 Tex. Civ. App. 436, 41 S. W. 707. But see *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281 (fact of execution of conveyance, where witness denies signing a conveyance); *East Tennessee, V. & G. R. Co. v. Daniel*, 91 Ga. 768, 18 S. E. 22 (proof that witness made no purchase at a designated store, which he gives as the reason for his presence at the place of the accident); *Gulf, C. & S. F. R. Co. v. Kizziah*, 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242 (witness for railroad company sued for injuries due to failure to furnish copy of rules and regulations, who testifies that injured employee never demanded copy thereof, may be impeached by testimony of another witness showing that he had demanded a copy); and in *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279, it is held that defendant in an action for damages for fraudulent representations inducing a purchase of corporate stock, who went into the subject of the organization of the corporation, and testifies on cross-examination that he informed the subscribers at what figure the patent account was taken over as a part of the assets of the corporation, may be impeached by testimony of the stockholder on that subject.

Similar facts: Defendant in an action for eggs sold cannot be impeached by evidence that his claims for deductions for unsalable eggs bought of other people were very heavy. *Davey v. Lohrmann*, 1 Misc. 317, 20 N. Y. Supp. 675. And in an action against a railroad company for personal injuries, evidence merely that the plaintiff has made claims against other railroad companies is inadmissible to affect his credibility, without proof that such claims were dishonest. *Hansee v. Brooklyn Elev. R. Co.* 66 Hun, 384, 21 N. Y. Supp. 230. And so also proof that plaintiff is an habitual litigant is not competent to impeach her as a witness. *Palmeri v. Manhattan R. Co.* 60 Hun, 579, 14 N. Y. Supp. 468. But evidence of similar representations to others at about the same time is admissible in an action to recover property purchased by defendant's assignor by means of false and fraudulent representations as to solvency, for the purpose of impeaching such assignor who on cross-examination denies that he made such similar representations. *Ankersmit v. Tuch*, 114 N. Y. 51, 20 N. E. 819.

Sweeney v. Kansas City Cable R. Co. 150 Mo. 385, 51 S. W. 682; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Royal v. Chandler*, 81 Me. 118, 16 Atl. 410; *Rucker v. Beuty*, 3 Ind. 70; *Holmes v. Anderson*, 18 Barb. 420; *Lane v. Bryant*, 9 Gray, 245, 59 Am. Dec. 282; *City Bank v. Young*, 43 N. H. 457; *Sloan v. Edwards*, 61 Md. 89. A witness who does not express an opinion as to the sanity of a person, but merely testifies to facts which are offered in evidence to show insanity, cannot be impeached by proof that during the time of the alleged incapacity he offered to submit a dispute with another to the person claimed to have been of unsound mind. *Hubbell v. Bissell*, 2 Allen, 196 (tending to show his opinion of his sanity).

But see *Cochran v. Amsden*, 104 Ind. 282, 3 N. E. 934 (opinion out of court different from that expressed on the witness stand); *Re McCarthy*, 65 Hun, 624, 20 N. Y. Supp. 581 (opinion of physician as to competency of testator may be contradicted by showing that he has previously stated that deceased was, in his opinion, not competent to make a will); *Sanderson v. Nashua*, 44 N. H. 492 (physician's opinion as to health of plaintiff may be contradicted by proof of prior inconsistent opinion).

And in *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741, it is said that a party has the right, for the purpose of discrediting a witness, to prove statements made by him contradicting his testimony, after the requisite examination of a witness in regard to such statements, whether they are statements of fact or expressions of opinion. *Waterman v. Chicago, A. & W. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136 (present opinion of physician and opinion on former trial). So, a witness who has testified as to the conduct, business habits, and conversation of testator and has stated that in his opinion the testator was a person of sound mind, may be impeached by proof of the prior opinion expressed by him that such testator was crazy. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990. And it is proper to show on the cross-examination of a witness who testifies as to the value of property, that he had at some prior time entertained a different opinion as to the value thereof. *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

Daniels v. Weeks, 90 Mich. 190, 51 N. Y. 273; *Williams v. Eikenberry*, 25 Neb. 721, 41 N. W. 770; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Fitzgerald v. Williams*, 148 Mass. 462, 20 N. E. 100; *Miller v. Baker*, 160 Pa. 172, 28 Atl. 648; *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649. And a witness who has testified for plaintiff in an action for personal injuries caused by a gully in a street, that he saw it before and after the accident, may be discredited by evidence that he had been employed by defendant town to repair any defects he might see in the street. *Spalding v. Merrimack*, 67 N. H. 382, 36 Atl. 253. So, the husband of one suing for personal injuries caused by her horse stumbling on a loose stone in a highway, who testifies he found a good many loose stones in the highway where the accident occurred, may be contradicted by the testimony of another witness that she was at the place of the accident with him soon after it occurred, and that he made no reply to her remark that there were no

stones in the road. *Judd v. Claremont*, 66 N. H. 418, 24 Atl. 427. But a father who brings an action as the next friend of his son for assault and battery upon the latter cannot, upon his examination as a witness for plaintiff, be impeached by evidence that before the trial he offered to settle if the defendant would pay the doctor's bill without further ceremony. *Neal v. Thornton*, 67 Vt. 221, 31 Atl. 296.

5. Form of question to impeaching witness.

The impeaching witness should be asked the same questions propounded to the principal witness in respect to the alleged statements;¹ but while such question should be identical it need not be in the exact words of the question asked the other witness.²

¹*Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. And in *Farmers Mut. F. Ins. Co. v. Bair*, 87 Pa. 124, in passing on the propriety of leading questions to an impeaching witness, the court says the proper and only way in which he could have been examined was by putting the question to him in the same language in which it had been put to the principal witness.

²*Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Roller v. Kling*, 150 Ind. 159; 49 N. E. 948 (and so framed as to permit of a negative and affirmative answer); *Spohn v. Missouri P. R. Co.* 122 Mo. 1, 26 S. W. 663. So, in *Sloan v. New York C. R. Co.* 45 N. Y. 125, deciding that a question asked an impeaching witness, although not the one precisely put to the principal witness, is sufficient as to form where it directs the attention of the impeaching witness to the time and place and subject, and the answer brought out is substantially a contradiction of the statement of the principal witness, it is said that the usual and most accurate mode of examining the contradicting witness is to ask the precise question put to the principal witness, but that the practice upon this subject must be, to some extent, under the control and discretion of the court. And in *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529, 30 N. W. 790, it is said that a ruling that, in examining an impeaching witness, the same questions must be put that are put to the witness sought to be impeached, if erroneous, is immaterial, where the impeaching witness did in fact testify fully as to all the conflicting statements claimed to have been made.

B. IMPEACHMENT BY PROOF OF HOSTILITY, BIAS, OR INTEREST IN THE ACTION.

The hostility,¹ bias,² or interest in the action³ of a witness may be shown for the purpose of affecting his credibility.

¹*John Morris Co. v. Burgess*, 44 Ill. App. 27; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26; *Morgan v. Wood*, 24 Misc. 739, 53 N. Y. Supp. 791; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492; *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581. Evidence of declarations made by a witness for plaintiff out of court after he has testified in the case is admissible to show his

hostility to defendant. *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606. And evidence that a witness has had an altercation with a brother of the opposite party is held admissible to show the *animus* of such witness in *Gallagher v. Kingston Water Co.* 25 App. Div. 82, 49 N. Y. Supp. 250. But that it is not error to exclude evidence as to the cause of the trouble, see *Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76. That a witness may be shown to have been discharged from the service of the opposite party, for the purpose of affecting his credibility, see *Louisville & N. R. Co. v. Berry*, 96 Ky. 604, 29 S. W. 449. But such evidence is inadmissible in the absence of any testimony showing how recent or remote in point of time the discharge was, as it is too remote and uncertain. *Missouri, K. & T. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666. And in *Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127, it is held that evidence tending to show the feeling of a discharged employee toward defendant, as a witness for plaintiff in an action for personal injuries, is immaterial to the issue, and not admissible for the purpose of affecting the credibility of such witness. Evidence of hostility between a witness and the father of two other witnesses whose characters he has impeached is inadmissible. *Atlanta Consol. Street R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191. And a witness cannot be discredited on the ground of ill-feeling against a party to an action, by proof merely that such party had brought an action for slander against him. *Wischstadt v. Wischstadt*, 47 Minn. 358, 50 N. W. 225. So, statements by the wife of defendant in a suit for alienating the affections of their son from his wife, that the son's wife may have got him cornered somewhere, but it will never do her any good, are incompetent to show any prejudice or feeling to affect the mother's testimony. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. And testimony that impeaching witness belonged to a village faction opposed to that to which the witness impeached belongs is too vague and remote. *Holston v. Boyle*, 46 Minn. 432, 49 N. W. 203.

²*Preferred Acci. Ins. Co. v. Gray* (Ala.) 26 So. 517; *Pyne v. Broadway & S. Ave. R. Co.* 46 N. Y. S. R. 662, 19 N. Y. Supp. 217; *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803; *Belmont v. Vinalhaven*, 82 Me. 524, 20 Atl. 89; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424 (medical witness for plaintiff in action for personal injuries, who denies having urged as a reason for settling another case the fact that he was instrumental in securing a large verdict in former trial of present case, may be contradicted by proof of such statement for the purpose of showing his attitude in the matter as affecting the weight of his evidence); *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803 (threat to make a house a dear one for the opposite party); *Longworthy v. Green Twp.* 95 Mich. 93, 54 N. W. 697. Defendant in an action for personal injuries is not concluded by the answers of plaintiff's witness on cross-examination denying a conversation with a third party tending to show his willingness to sell his testimony, but may call another witness to show his *animus*. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. And a witness for plaintiff who states on cross-examination that he has no recollection of having admitted to a specified person that the defendant received a consideration for giving an agent of plaintiff a sworn statement as to his evi-

dence in suit, or as to facts connected with the conspiracy, may be shown by such person to have made such statement, for the purpose of impeachment, as tending to show that his testimony is the result of corruption. *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

**Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775; *Jernigan v. Flowers*, 94 Ala. 508, 10 So. 437; *Goodman v. Myers*, 11 Misc. 360, 32 N. Y. Supp. 239 (that witness has indemnified the party for whom he testifies is admissible to show his interest); *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27 (deed of land involved admissible to show interest of apparently disinterested witness); *McKindley v. Drew*, 69 Vt. 210, 37 Atl. 285 (pecuniary interest of life insurance solicitor, where agent is witness in his own behalf); *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281 (on cross-examination); *Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58 (on cross-examination). See also statutory provisions in Connecticut, Illinois, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Oklahoma, Utah, Vermont, Washington, Wisconsin; and also general provisions in Indiana, Iowa, Nebraska, Nevada, and New Mexico that facts which formerly disqualified or excluded testimony may still be shown to affect credibility. Under Alabama statutes the interest of a witness in a criminal case, goes to his credibility. But the pecuniary interest of the witness in the result of the litigation as affecting his credibility cannot be shown on the trial before a jury by evidence that he is a surety on an appeal bond given in the case by the party calling him, as such evidence would necessarily disclose the fact that such party was unsuccessful in the lower court. *Israel v. Baker*, 170 Mass. 12, 48 N. E. 621. And a witness whose credibility is attacked on the ground of interest as a partner in a suit may testify that he sold out to his partner who has indemnified him as to past liabilities of the firm, as showing that he has no interest in the result. *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425.

Many of the above statutes likewise cover relationship, either in express terms, or by stating that facts which at common law would cause the exclusion of a witness may still be shown to affect his credibility.

As to cross-examination for the purpose of showing hostility, bias, or interest, see *ante*, Division VII. § 27.

C. IMPEACHMENT BY PROOF AS TO CHARACTER OR REPUTATION AND FACTS AFFECTING THEM.

1. General reputation for truth and veracity or moral character.

Whether the impeachment of a witness by proof as to general reputation or character should be confined to reputation for truth and veracity¹ or extended to include general character² has been much discussed, and the decisions widely differ. In some states at least the inquiry has been extended by statute to truth, honesty, and integrity,³ and in others to general bad reputation or moral character.⁴

*That it should be so limited, see *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308; *Moreland v. Lawrence*, 23 Minn. 84; *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Taylor v. Clendening*, 4 Kan. 524; *Newman v. Mackin*, 13 Smedes & M. 383; *Perkins v. Mobley*, 4 Ohio St. 668; *Frye v. Bank of Illinois*, 11 Ill. 367; *Sargent v. Wilson*, 59 N. H. 396; *Boon v. Weathered*, 23 Tex. 675. And in *Jackson ex dem. Boyd v. Lewis*, 13 Johns. 504, and *Bakeman v. Rose*, 14 Wend. 110, in deciding that evidence of character of witness as public prostitute or of particular immoral acts was inadmissible for the purpose of impeachment, the courts say that the evidence should be confined to reputation or character for truth and veracity.

**Motes v. Bates*, 80 Ala. 382; *McInerney v. Irwin*, 90 Ala. 275, 7 So. 841; *Tackett v. May*, 3 Dana, 80; *Hume v. Scott*, 3 A. K. Marsh, 260; *Blasland-Parcels-Jordon Shoe Co. v. Hicks*, 70 Mo. App. 301; *Anonymous*, 1 Hill L. 258. And in passing on particular acts or instances the courts in *Thurman v. Virgin*, 18 B. Mon. 785, and *Evans v. Smith*, 5 T. B. Mon. 364, 17 Am. Dec. 74, say that general character or reputation may be shown. And a witness may be impeached by evidence that his reputation for fair dealing is not good. *Kingman & Co. v. Shawley*, 61 Mo. App. 54. But while a witness may be asked as to the general reputation or character of a witness sought to be impeached, the specific constituents of character other than truth and veracity, or the cause producing character cannot be inquired into. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142. See *infra*, § 6, as to specific acts or reputation as to particular conduct.

*California, Idaho, Montana, and Utah.

*Georgia, Oregon, Indiana, Indian Territory, Iowa, Kentucky, and New Mexico.

2. Foundation, questioning impeaching witness.

Before the impeaching witness can be asked as to what is the reputation of the witness sought to be impeached, a foundation must be laid by asking him as to his knowledge of the general reputation of such witness.¹ After his knowledge is shown and he has stated what such reputation is, he may be asked whether, from his knowledge of such reputation, he would believe the witness under oath.²

¹*Foult v. Eckert*, 61 Ill. 318; *French v. Sale*, 63 Miss. 386; *Carlson v. Win-terson*, 10 Misc. 368, 31 N. Y. Supp. 430. Evidence that an impeaching witness has had business dealings with the other witness for many years is not a sufficient foundation for questions touching the other's reputation for truth and veracity and as to whether he is entitled to belief under oath. *Healey v. Terry*, 16 Daly, 117, 9 N. Y. Supp. 519. Nor is a witness qualified where his information on the subject is derived from two persons, only one of whom resides in the place where the witness sought to be impeached lives, and the other living in another place and having, so far as it appears, no knowledge or information upon the subject.

Meyer v. Suburban Home Co. 25 Misc. 686, 55 N. Y. Supp. 566. And impeaching witnesses must speak from general reputation and not from their private opinions as to such reputation. *Benesch v. Waggoner*, 12 Colo. 534, 21 Pac. 706. In *Wetherbee v. Norris*, 103 Mass. 566, it is said to be within the discretion of the trial judge to require the impeaching witness to be first asked whether he knows the reputation of the other witness for truth and veracity.

Where persons called to impeach a witness have been familiar with his reputation in the past, recent lack of opportunity for knowledge of his reputation goes rather to the effect of their testimony than to its admissibility. *Wagoner v. Wagoner* (Md.) 9 Cent. Rep. 84, 10 Atl. 221. So, a witness may testify to the bad reputation for truth in the vicinity where he lived, of another witness, although he does not know such reputation for the last two years preceding the trial. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. Evidence of impeaching witnesses whose answers show that they understand the question in a general sense, and that they relate to the general reputation of the witness to be impeached, is not rendered incompetent by the omission of the word "general" from the question. *Coates v. Sulan*, 46 Kan. 341, 26 Pac. 720. But an impeaching witness who testifies that he is not acquainted with the general reputation of the witness sought to be impeached should not be allowed to testify further upon the subject. *Overstreet v. Dunlap*, 56 Ill. App. 486. And a witness cannot testify as to the bad reputation of another witness to impeach his credibility, until the competency of the former has been established, where the issue is raised. *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430. A witness not professing to know the general reputation of a witness sought to be impeached, except in connection with "some alleged frauds," is not acquainted with the general character of such witness so as to make him competent as an impeaching witness. *Sorrelle v. Craig*, 9 Ala. 534. But an impeaching witness who has known the witness sought to be impeached for twenty years, at one time lived within 4 miles of him and has dealt with him, is competent to testify to his general reputation as a man of truth, although he has no knowledge of his general character for truth except by report. *Kimmel v. Kimmel*, 3 Serg. & R. 337, 8 Am. Dec. 655.

In Georgia the statutes provide that the opinion of one witness is inadmissible as to character.

An impeaching witness to be competent is generally required to come from the place of residence, or former residence, of the witness sought to be impeached, on the theory that to know the general reputation of a person one must live in the same community; and so it is held that a stranger who goes to the community in which such witness lives for the purpose of ascertaining his character or reputation, and giving evidence in the cause, is not competent to testify as to what he ascertains as to his character or reputation, for the purpose of impeachment. *Douglass v. Tousey*, 2 Wend. 354, 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101. So, the evidence of a person at a place where the witness sought to be impeached visited for only a few months, as to his general reputation, is inadmissible for the purpose of impeachment. *Waddingham v. Hulett*, 92 Mo.

528, 5 S. W. 27. But one who resides in the same place as that in which the witness sought to be impeached formerly resided, and for five years in the neighborhood in the place in which the latter subsequently lived twelve years before the taking of his deposition in the case, is competent as an impeaching witness.

^{*}*Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Hillis v. Wylie*, 26 Ohio St. 574; *Eason v. Chapman*, 21 Ill. 33; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Stevens v. Irwin*, 12 Cal. 306; *Snow v. Grace*, 29 Ark. 136. And see also criminal cases of *State v. Johnson*, 40 Kan. 266, 19 Pac. 749; *State v. Christian*, 44 La. Ann. 950, 11 So. 589; *Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1. And that the impeaching witness may be asked whether he would believe the other witness under oath in a matter in which he was interested, see *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; but in *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, it was held that the impeaching witness could not be asked if he would believe the other witness under oath in a case where he was personally interested. And sustaining witness may be likewise asked if they would believe the witness they sustain under oath. *National Bank v. Scriven*, 63 Hun, 375, 18 N. Y. Supp. 277; *Adams v. Greenwich Ins. Co.* 70 N. Y. 166. See also the provision of the Georgia statutes permitting the asking of this question. In *Laclede Bank v. Keeler*, 109 Ill. 385, it is said that to successfully impeach a witness it is not necessary to ask the impeaching witness who testifies to his knowledge of the general reputation of the other witness and that it is bad, whether he would believe him under oath, although this question is permitted by the rule adopted in Illinois.

But see, contra, *Benesch v. Wagner*, 12 Colo. 534, 21 Pac. 706, and criminal case of *State v. Miles*, 15 Wash. 534, 46 Pac. 1047. And in *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760, it is said, in discussing proper examination of the impeaching witness, that he cannot be asked whether he would believe the other witness under oath. So, the court in *Willard v. Goodenough*, 30 Vt. 393, in deciding that on the cross-examination of an impeaching witness he cannot be asked if he would believe the other witness under oath, says that the same rule is applicable as in direct examination, which in that state does not permit such question.

▲ witness who has not been asked the preliminary questions as to his knowledge of the general reputation of the witness sought to be impeached, and what such reputation is, cannot be asked whether he would believe such witness under oath. *Bogle v. Kreitzer*, 46 Pa. 465. See also *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430. And so, in *Healey v. Terry*, 16 Daly, 117, 9 N. Y. Supp. 519, it is held that excluding questions touching reputation for truth and veracity and as to whether one is entitled to belief under oath, is discretionary where the preliminary question whether the impeaching witness knows the general reputation of the other, has not been asked.

▲As to cross-examination of impeaching witness, see *ante*, Division VII. § 26.

3. Place and time of reputation.

As a general rule, the testimony should be confined to the reputation of the witness sought to be impeached in the community where he lives,¹ but is permitted as to his former residence if not too remote in point of time and under special circumstances.² As it is the credibility of the witness at the time of the trial that is to be impeached the evidence should not be too remote.³

¹*Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635. To impeach a witness on the ground that his general reputation is bad, it must be shown that such bad reputation is general in the community. *Winter v. Central Iowa R. Co.* 80 Iowa, 443, 45 N. W. 737. And it is not limited to the immediate neighborhood, but will embrace his reputation in the community. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. So, the testimony of an impeaching witness who lives in the same city, but not in the same ward as the other witness, who testifies that he has lived in such city twenty years and has known such other witness about four years, is improperly excluded on the ground that he does not reside in the immediate neighborhood of such other witness. *Wallis v. White*, 58 Wis. 26, 15 S. W. 767. And his general character for integrity and fair dealing in commercial transactions cannot be impeached by evidence of particular statements and criticisms made by persons living remote from his home and place of business, as to his failure and inability to meet his pecuniary obligations. *Bird v. Halsy*, 87 Fed. Rep. 671. And evidence of a person at a place where the witness sought to be impeached visited for only a few months, as to his general reputation, is inadmissible for the purpose of impeachment. *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27. A question to an impeaching witness as to what the reputation of the other witness was at the time of the execution of the deposition in a place different from that where it appears he resided at the time of the taking thereof, and in which the deposition was so taken, is prima facie irrelevant. *Aurora v. Cobb*, 21 Ind. 492.

²*Holliday Bros. v. Cohen*, 34 Ark. 707 (a few months before); *Louisville, N. A. & C. R. Co. v. Richardson*, 66 Ind. 43 (few months before); *Coates v. Sulau*, 46 Kan. 341, 26 Pac. 720 (few months before); *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459 (two months before); *Norwood & B. Co. v. Andrews*, 71 Miss. 641, 16 So. 262 (two years before); *Brown v. Luehrs*, 1 Ill. App. 74 (three or four years before); *Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. 396 (four years before); *Rathbun v. Ross*, 46 Barb. 127 (five years before, where witness of mature age). And in *Stevens v. Rodger*, 25 Hun, 54, the judgment was reversed because the trial court had restricted the inquiry to a period five years previous to the trial. A witness who has lived in one locality long enough to make a reputation may be impeached by proof thereof at that place, where since he left that vicinity he has not resided in any one locality long enough to establish a reputation that could be generally known. *Blackburn v. Mann*, 85 Ill. 222. So, evidence of the general bad character of a witness for truth and veracity during eleven years at his former place of residence

is admissible for the purpose of impeachment, where for seven years since that time he has been roving about the country. *Holmes v. State-ler*, 17 Ill. 453. But in *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18, where no such special circumstances existed, it was held that a witness cannot be impeached by evidence of his bad character at a place from which he removed seven years before the trial, in the absence of any evidence that his reputation is bad at the place where he is living at the time of the trial. And in *Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635, evidence of the general reputation of the witness for truth and veracity at his former residence, which had ceased two and one half years before his testimony was given, is said not to be available.

*Not too remote, see *Beatty v. Larzelere*, 15 Mont. Co. L. Rep. 67 (seven months). And where a witness might be considered as impeached by his testimony, the evident contradictions by himself and the circumstances surrounding the transactions with which he is connected, he may be impeached by evidence as to his character for truth and veracity thirty years before, where during the intervening time he has been absent in a foreign country at different times and is not shown to have any settled place of abode. *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725. See also cases cited *supra*, note 2.

But testimony touching the credibility of a witness is held too remote in *Miller v. Miller*, 187 Pa. 574, 41 Atl. 277, when it relates to a period about four years before the trial. And the court in *Rucker v. Beaty*, 3 Ind. 70, in passing on the propriety of and holding harmless the exclusion of evidence of the general bad character of the witness five years before, where his bad character at the time of the trial had been proved by other evidence, says that if the defendant had not been able to establish that it was bad at the time of the trial he had no right to go back five years for the sake of attacking it. But see cases *supra*, note 2.

In *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, it is said that it is in the discretion of the court to admit, as to a witness's reputation for truth and veracity four years before the trial, the impeaching testimony of a witness who had several years' acquaintance with him, as no inflexible rule can be laid down.

4. Conviction.

A witness may be impeached by proof of his conviction of a crime;¹ and this may usually be shown, otherwise than by cross-examination of the witness himself, only by the record thereof.²

¹Just what may be shown under this rule has been much discussed, some cases and statutes requiring the conviction to have been of a felony, or of a crime involving moral turpitude, while other decisions and statutes permit the proving of a conviction of any crime or of a misdemeanor, for the purpose of impeachment.

In *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586, conviction of any crime is admissible, although not of such nature as in itself to affect the witness's credibility, under the Massachusetts statutes providing that a

conviction of a crime may be shown to affect the credibility of a witness. Several indictments and convictions of violating excise law may be shown even on plea of guilty. *Morenus v. Crawford*, 51 Hun, 89, 5 N. Y. Supp. 453. Arrest and conviction for violation of pension laws. *Cole v. Lake Shore & M. S. R. Co.* 95 Mich. 77, 54 N. W. 638. Conviction of forgery notwithstanding lapse of time since the conviction. *Wolff v. Van Housen*, 55 Ill. App. 295. In Ohio, in civil cases, previous conviction of an infamous crime is relevant to impeach the credibility of a witness, although there is no express statutory provision concerning it. *Baltimore & O. R. Co. v. Rambo*, 16 U. S. App. 277, 59 Fed. Rep. 75, 8 C. C. A. 6. A conviction of larceny is a conviction of a "*crimen falsi*" and admissible as tending to discredit the testimony of the person convicted. *Georgia R. Co. v. Homer*, 73 Ga. 251. But in *Card v. Foot*, 57 Conn. 427, 18 Atl. 713, it is held that the provision of the general statutes that no person shall be disqualified by reason of his conviction of "a crime," but such conviction may be shown for the purpose of affecting his credit, does not permit a conviction of any offense to be proved for the purpose of discrediting him, except for such offenses as at common law would disqualify him as a witness.

A judgment of conviction from which an appeal has been taken, followed by a *nolle pros.* in the appellate court, cannot be proved to affect the credit of the witness. *Card v. Foot*, 57 Conn. 427, 18 Atl. 713.

A judgment in a civil action under a city ordinance for the recovery of a penalty for the keeping of a disorderly house is not a conviction of a crime or misdemeanor the record of which is admissible in evidence for the purpose of discrediting the defendant therein as a witness in another action. *Arhart v. Stark*, 6 Misc. 579, 27 N. Y. Supp. 301.

Statutes or code provisions in some states at least cover this question. Conviction of a crime or criminal offense: Massachusetts, Michigan, Connecticut, Kansas, New Jersey, Oklahoma, Oregon, Washington, Wisconsin, Mississippi. Any crime: Colorado, Illinois, Minnesota, New York (Penal Code). Crime or misdemeanor: Rhode Island, New York (Code Civ. Proc.) Felony or misdemeanor: New Mexico. Felony: California, Delaware, Idaho, Indian Territory, Iowa, Arkansas, Kentucky, Montana, Nebraska, Nevada. Crime involving moral turpitude: Vermont. Infamous crime: Alabama, Maryland, New Hampshire. Any offense: Montana (Penal Code).

In the late Nebraska case of *Young Men's Christian Asso. v. Rawlings* (Neb.) 83 N. W. 175, it is held that the provisions of the statute that a witness may be interrogated as to his previous conviction of a felony, but that no other proof is competent except the record thereof, must control the general provision that facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility, so that evidence of a judgment of conviction of contempt of court is inadmissible for the purpose of impeachment.

**Baltimore & O. R. Co. v. Rambo*, 16 U. S. App. 277, 59 Fed. Rep. 75, 8 C. C. A. 6; *Pulliam v. Cantrell*, 77 Ga. 563, 3 S. E. 280; *Killian v. Georgia R. & Bkg. Co.* 97 Ga. 727, 25 S. E. 384. But see *Gage v. Eddy*, 167 Ill.

102, 47 N. E. 200, that oral testimony of conviction of a witness for crime is admissible for the purpose of affecting his credibility, under the Illinois statutes.

Statutes. By record, or examination of the witness: Arkansas, Indian Territory, Idaho, Minnesota, Nebraska, New Hampshire (record), New Jersey (otherwise), New York, Oregon, Wisconsin. Or certificate as to record: Maryland, New Mexico. Like any fact not of record, by witness cognizant thereof, or other competent evidence: Colorado, Illinois. By the examination of "a witness:" Kentucky. By other evidence: Mississippi.

As to cross-examination of the witness as to conviction, see *ante*, Division VII. § 27.

5. Indictment, etc.

Evidence merely that a person has been charged with and tried for a crime, or indicted, without proof of conviction, is usually inadmissible for the purpose of impeachment.¹

¹*Willson v. Eveline*, 35 App. Div. 92, 54 N. Y. Supp. 514; *Killiam v. Georgia R. & Bkg. Co.* 97 Ga. 727, 25 S. E. 384; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887. That a witness has been fined for disturbing the peace and for some other misdemeanor is inadmissible for the purpose of impeachment. *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214. See *ante*, Division VII. § 27, as to cross-examination of the witness with reference thereto.

A certified copy of the record adjudging one guilty of having found stolen property is inadmissible to impeach the person so charged, as no crime is charged thereby. *Norton v. Perkins*, 67 Vt. 203, 31 Atl. 148. And to contradict a witness who denies that he pleaded guilty of a certain offense before a magistrate, proof that he did plead guilty of some offense not specified is erroneous. *Heeney v. Kilbane*, 59 Ohio St. 499, 53 N. E. 262.

In Texas there seems to have been much confusion in the decisions. That witness cannot be impeached by proof that he is charged by indictment with misdemeanors, see *Lewis v. Bell* (Tex. Civ. App.) 40 S. W. 747. But in *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843, it is held that the answer of the witness to a cross-interrogatory, that he has been indicted for embezzlement and is confined in jail awaiting trial, is admissible in evidence as affecting his credibility. But in *Texas Brewing Co. v. Dickey* (Tex. Civ. App.) 43 S. W. 577, it is said that evidence that a criminal charge was pending against a witness, or that he was indicted for theft, the indictment having been dismissed for want of evidence to sustain the charge, if admissible at all for the purposes of impeachment, can only be drawn out on cross-examination.

On the question of cross-examination there seems also to have been much difference of opinion. *Freedman v. Bonner* (Tex. Civ. App.) 40 S. W. 47, holds that a witness cannot be asked for the purpose of impeachment, with reference to his prosecution for forgery, his defense, etc.

And in *Hill v. Dons* (Tex. Civ. App.) 37 S. W. 638, it is held that a witness cannot be impeached by compelling him to answer on cross-examination a question as to his having been indicted for forgery. Likewise the credibility of a witness cannot be attacked on cross-examination by showing that he had been acquitted of the charge of carrying a pistol, because he did not know it was wrong to do so. *Houston, E. & W. T. R. Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708. And in *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151, a similar rule was laid down with reference to compelling a witness to answer on cross-examination that he was a deserter from the United States army. But in *Linz v. Skinner*, 11 Tex. Civ. App. 512, 32 S. W. 915, it was held that a witness may for the purpose of affecting his credibility be asked on cross-examination if he had not been indicted for embezzlement or perjury, if such indictments are not too remote.

In the criminal case of *Lights v. State*, 21 Tex. App. 309, 17 S. W. 423, it was permitted on cross-examination to ask a witness for defendant whether he had not been in a penitentiary and if he was not sent up from a certain place and county. And in *Woodson v. State*, 24 Tex. App. 162, 6 S. W. 184, holding that it was not error to refuse a question to the state's witness as to whether he had not been confined in a penitentiary for a crime, because the purpose of the question was not disclosed, the court says that if it had been shown that the defendant expected an affirmative answer and that the object in eliciting such answer was to affect the credibility of the witness, we would hold that the court erred materially in refusing to permit the question to be answered. But here there was conviction and sentence and not merely indictment or charge.

In the criminal case of *Carroll v. State*, 32 Tex. Crim. Rep. 431, 24 S. W. 100, it is held that a witness may on cross-examination be interrogated as to whether he is not then under indictment for theft, for the purpose of impeachment. And in the case of *Jackson v. State*, 33 Tex. Crim. Rep. 281, 26 S. W. 194, 622, it is held that a defendant on trial for robbery, who testifies as a witness in his own behalf, may be impeached by compelling him to answer on cross-examination whether he has been previously arrested for burglary, robbery, and theft.

For the discussion of the question of cross-examination for the purpose of testing credibility, see *ante*, Division VII. § 27.

6. Specific acts or offenses or line of conduct.

As a general rule it is not permissible to show specific acts or offenses or line of conduct, for the purpose of impeaching a witness.¹

¹Statutes in some states exclude such proof: Arkansas, California, Georgia (except on cross-examination), Idaho, Indian Territory, Kentucky, Montana, Oregon.

Gilpin v. Daly, 58 Hun, 610, 12 N. Y. Supp. 448; *Meyer v. Suburban Home Co.* 25 Misc. 686, 55 N. Y. Supp. 566; *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618 (that witness expelled from Masonic lodge for false swear-

ing); *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430 (that the witness has forged the impeaching witness's name to a note); *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142 (notorious counterfeiter); *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810 (impeaching witness cannot be asked if witness sought to be impeached is not a common thief); *Palmeri v. Manhattan R. Co.* 39 N. Y. S. R. 23, 14 N. Y. Supp. 468 (habitual litigant); *Silliman v. Sampson*, 42 App. Div. 623, 59 N. Y. Supp. 923 (proof that witness many years before had confessed to committing a larceny).

Evidence as to general character for drunkenness of a witness is not admissible for the purpose of impeachment. *Hoitt v. Moulton*, 21 N. H. 586; *Brindle v. M'Ilvaine*, 10 Serg. & R. 282; *Thayer v. Boyle*, 30 Me. 475 (intemperate habits). But it may be shown that the witness was drunk at the time of the occurrence, as bearing on his ability to testify correctly to what occurred. *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186; *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899.

Immoral character or conduct:

General character as to any particular acts of ignominy or turpitude cannot be inquired about on the examination of an impeaching witness. *Thurman v. Virgin*, 18 B. Mon. 785. Evidence that one witness wrote and the other has read a highly immoral book is inadmissible to impeach their credibility. *Re James*, 124 Cal. 653, 57 Pac. 578, 1008. Acts tending to show that a woman who has testified as a witness is destitute of moral qualities cannot be proved. *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1, 405. Evidence of immoral connection is inadmissible when it consists of proof of particular facts not directly touching the question of their veracity. *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395. Evidence of improper relations of one claiming a distributive share of a decedents' estate under an allegation of marriage with him, is inadmissible to impeach her credibility as a witness. *Re James*, 124 Cal. 653, 57 Pac. 578, 1008. Evidence that a witness was guilty of illicit intercourse with her husband before their marriage, thirteen years before, is too remote for the purpose of impeaching her credibility. *De Arman v. Taggart*, 65 Mo. App. 82 (brought out on cross-examination). A letter written by plaintiff in an action for slander, tending to show improper intimacy with a certain man, is inadmissible to impeach her under the Oregon statutes. *Leverich v. Frank*, 6 Or. 212. Proof of adultery at various times and places not admissible to impeach witness. *Dimick v. Downs*, 82 Ill. 570. Single act of bastardy on the part of a female witness cannot be given in evidence to destroy her credit. *Weathers v. Barksdale*, 30 Ga. 888. That a witness kept a house of assignation and was a disreputable character is inadmissible for impeachment. *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55. Particular instances of moral turpitude, that a woman is unchaste, cannot be proved to impeach her, although general character may be inquired into. *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74. Or that she was so regarded sixteen years before. *Turner v. King*, 98

Ky. 253, 32 S. W. 941, 33 S. W. 405. And evidence that a woman was arrested in a house of ill fame is not admissible to impeach her testimony. *Tucker v. Tucker*, 74 Miss. 93, 32 L. R. A. 623, 19 So. 955. Evidence tending to show bigamy is likewise inadmissible to impeach the credibility of a witness. *Evans v. DeLay*, 81 Cal. 103, 22 Pac. 408. And that a woman is a prostitute is inadmissible to impeach her testimony, see *McInerny v. Irvin*, 90 Ala. 275, 7 So. 841; *Bakeman v. Rose*, 14 Wend. 105; *Spears v. Forrest*, 15 Vt. 435. Especially where it relates to a period some years before. *Jackson ex dem. Boyd v. Lewis*, 13 Johns. 504.

D. IMPEACHMENT AS TO COLLATERAL AND IMMATERIAL OR IRRELEVANT MATTER BROUGHT OUT ON CROSS-EXAMINATION.

The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination;¹ but hostility or bias denied on cross-examination may nevertheless be proved to impeach the witness,² and a corrupt motive may sometimes be shown.³

¹*Louisville Jeans' Clothing Co. v. Lischoff*, 109 Ala. 136, 19 So. 436; *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568; *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1, 405; *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Butler v. Cooper*, 3 Kan. App. 145, 42 Pac. 839; *Hill v. Froehlick*, 38 N. Y. S. R. 24, 14 N. Y. Supp. 610; *Paddock v. Kappahan*, 41 Minn. 528, 43 N. W. 393; *Manget v. O'Neill*, 51 Mo. App. 35; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887; *Tallman v. Kimball*, 74 Hun, 279, 26 N. Y. Supp. 811; *Leinkauf v. Lombard*, 12 App. Div. 302, 42 N. Y. Supp. 391; *McNeill v. Metropolitan Street R. Co.* 20 Misc. 426, 45 N. Y. Supp. 1030; *North Chicago Street R. Co. v. Southwick*, 165 Ill. 494, 46 N. E. 377; *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698; *Carpenter v. Lingenfelter*, 42 Neb. 728, 32 L. R. A. 422, 60 N. W. 1022; *Woodroffe v. Jones*, 83 Me. 21, 21 Atl. 177; *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492.

Thus a witness on the trial of a particular issue or issues before a referee cannot be impeached by evidence of statements contradictory to his evidence, made upon the trial of an issue by the court before the order of reference, which is collateral to the issue tried by the referee. *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416. And a witness for plaintiff in an action for personal injuries caused by a defective sidewalk, who has testified that the walk was constructed of inferior lumber, cannot be contradicted as to a collateral matter testified to by him in connection therewith,—that there was no lumber yard in the city at the time the walk was constructed. *East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1077. And witness for employer in an action for wrongful discharge cannot be impeached by evidence contradicting his denial's

of statements claimed to have been made by him while acting as foreman of the employer and in the latter's absence, to the effect that it was fixed so that plaintiff would not stay in the employment, as such inquiry relates to a collateral matter. *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. 154. One who testifies on direct examination that only parts of law books would be consumed in a fire like the one in question, and gives his opinion on cross-examination that in another fire designated a specified quantity of such books could not have been burned without leaving some portion of them, cannot be impeached by showing that in the designated fire no portion of such books was left unburned. *Names v. Dwelling Ins. Co.* 95 Iowa, 642, 64 N. W. 628. A witness for defendant who has denied on cross-examination that he stated at a specified time and place that he had borrowed money of defendant at a usurious rate of interest cannot, where the question at issue is whether or not the loan to the plaintiff was usurious, be contradicted by proof that he had made such statement, as the question relates to a collateral matter and the party asking it was bound by the answer. *Murphy v. Backer*, 67 Minn. 510, 70 N. W. 799. That a witness who has testified to the value of land told another, two years before, that he was not acquainted with real estate values in the vicinity, is inadmissible, as it is a collateral and immaterial matter. *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227. So, testimony of previous habits of sobriety of a person suing for negligence, being brought out on cross-examination, and being a clearly collateral matter, is not open to contradiction for the purpose of discrediting him by previous deposition tending to prove drunkenness during the same period. *Union P. R. Co. v. Reese*, 15 U. S. App. 92, 56 Fed. Rep. 288, 5 C. C. A. 510. A witness who fixes the time of a conversation as that when he went to sell a party to the action a machine cannot be impeached by proof that the order for such machine was not written by him. *Hoover v. Cary*, 86 Iowa, 494, 53 N. W. 415. And a witness who on cross-examination has testified that she is not addicted to the use of morphine cannot be impeached by evidence of the mere fact that she had taken morphine, there being nothing to show the amount or frequency or any ill effects on her mind or memory, as that is an immaterial matter. *Botkin v. Cassady*, 106 Iowa, 334, 76 N. W. 722. In an action for personal injuries in a wreck claimed to have been caused by a loose wheel, a witness who denies that he was informed that the wreck was caused by a loose wheel cannot be contradicted and impeached by proof that he was so informed, as that is an immaterial matter. *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492. And an engineer who has testified that he did not see plaintiff before he was struck by his train, or know that he was injured until the following day, cannot be impeached by contradicting his testimony that he did not see any person on one side of the track near the crossing where the accident occurred, who it is claimed attracted his attention and pointed back where the accident happened, as such testimony is immaterial. *Texas & P. R. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852. So, a statement by the daughter of plaintiff in an action for personal injuries received by collision with an electric car, made soon after its occurrence, that it was her father's

"fault," being inadmissible as original evidence, cannot be made the basis for impeaching the daughter as a witness on her denial that she made such statement. *Saunders v. City & Suburban R. Co.* 99 Tenn. 130, 41 S. W. 1031.

The test of whether a matter is collateral or not is said to be whether or not the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea.

See further illustrations of the rule: *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660; *Brower v. Ream*, 15 Ind. App. 51, 42 N. E. 824; *Kennett v. Engle*, 105 Mich. 693, 63 N. W. 1009; *Scharff v. Grossman*, 59 Mo. App. 199; *Hinton v. Pritchard*, 98 N. C. 355, 4 S. E. 462; *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540; *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *Gates v. Rifle Boom Co.* 70 Mich. 309, 38 N. W. 245; *Farmers' Loan & T. Co. v. Montgomery*, 30 Neb. 33, 46 N. W. 214; *Hamilton v. Forsyth*, 77 Hun, 578, 28 N. Y. Supp. 1016; *Rogers v. Cook*, 3 Utah, 123, 30 Pac. 234; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854. So the declarations of the foreman of defendant some time after the happening of an accident, with reference to the cause thereof, are not admissible to impeach him as a witness for defendant, although he denied on cross-examination that he made such declarations, where there is no substantive evidence tending to establish the matter to which the alleged declarations related. *Pfeffer v. Stein*, 26 App. Div. 535, 50 N. Y. Supp. 516. A witness cannot be impeached by evidence that he has made statements contradictory of testimony elicited by the party offering to impeach him, given when recalled for the purpose, and which did not tend to better or explain that given on his direct examination. *Surdam v. Ingraham*, 36 N. Y. S. R. 769, 12 N. Y. Supp. 798. And previous declarations of a witness in regard to an immaterial matter as to which his testimony is incompetent and improperly elicited on cross-examination by the party seeking to impeach him are inadmissible in evidence for the purpose of impeaching his veracity. *Goltz v. Griswold*, 113 Mo. 144, 20 S. W. 1044.

But evidence by a witness for defendant as to a conversation with plaintiff's intestate, who on cross-examination also testifies to a similar conversation at a later date, may be contradicted as to the latter conversation in rebuttal, for the purpose of discrediting the witness. *Cloutier v. Grafton & U. R. Co.* 162 Mass 471, 39 N. E. 110. And in *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725, it is held that where a motorman of an electric street-railway company, by whose alleged negligence plaintiff was injured, has testified in chief that he instantly applied the brake and did everything possible to stop the car, questions to him on cross-examination as to whether he had not told others on the day after the accident that he neglected his business and forgot to put on the brake, are not collateral or irrelevant to the issue, and his negative answers thereto may be contradicted by other testimony for the purpose of impeachment. A conversation of the general manager of a corporation defendant in a libel suit, tending to show

his motive, is not a mere collateral matter. *Post Pub. Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. Rep. 530, 8 C. C. A. 210.

Any error there may be in permitting witnesses to be contradicted on collateral matters for the purpose of impeachment, without having cautioned that they would be contradicted, is obviated when the witnesses impeached are recalled and allowed to make explanations. *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341.

Thus, evidence of statements made by a witness out of court is admissible for the purpose of showing his hostility to one of the parties to the suit, although brought out and denied on cross-examination, as the general rule that a witness cannot be impeached or contradicted as to collateral matters so brought out does not apply where interest or hostility are sought to be shown. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990. Where a witness on cross-examination has denied that he had previously stated that he would have to testify as favorably as possible for the party calling him in order to hold his job, it is not error to permit the other party to prove that he had made such declaration, as the rule precluding contradiction of an answer on cross-examination to an immaterial question does not apply where the purpose of it is to show motive or bias in favor of or against a party. *Illinois C. R. Co. v. Haynes*, 64 Miss. 604, 1 So. 765. And a witness who on cross-examination denies making a declaration may be contradicted by proof of such declaration, although it relates to a collateral matter, where it tends to show his temper, bias, or disposition. *Cathey v. Shoemaker*, 119 N. C. 424, 26 S. E. 44. See also *supra*, subdivision B, as to impeachment by proof of hostility, bias, or interest. While interest is usually provable for the purpose of impeachment, either under the decisions of the courts or under statutory provisions, yet in the case of *Kramer v. Thomson-Houston Electric Light Co.* 95 N. C. 277, it is held that the answer of a witness who is also a party to an action, to a question as to a collateral matter put solely with a view to disprove and discredit him by showing his interest in or relation to the controversy, cannot be contradicted.

Thus, letters written by a witness in reference to matters involved in the suit in which he is called, showing a corrupt disposition, for a pecuniary consideration, to conceal or pervert the truth in the matter as to which he testifies, are admissible for the purpose of impeachment.

Alward v. Oaks, 63 Minn. 190, 65 N. W. 270. So, defendant in an action for personal injuries is not concluded by the answers of plaintiff's witness on cross-examination denying a conversation with a third party to show his willingness to sell his testimony, but may call another witness to show his *animus*. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. But in *McNeill v. Metropolitan Street R. Co.* 20 Misc. 426, 45 N. Y. Supp. 1030, it is held that plaintiff in an action for personal injuries against a street-car company is bound by the testimony of the conductor on cross-examination, denying that he stated to plaintiff's attorney that he had been offered money by the company to stand by his statement of the case, and that if plaintiff wanted him to make

a statement he would have to pay him that amount, and cannot contradict him for the purpose of affecting his credibility. But it is questionable if the authorities cited in this decision sustain its conclusion.

In *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591, it is held that a witness in an action for personal injuries who is claimed to have made a statement that he had desired to obtain evidence of certain facts and that money was no object, and who, on his attention being called thereto on cross-examination, denies having made such statement, cannot be impeached by proof thereof,—especially by the testimony of a witness not mentioned as the one to whom it was made, where he does not testify as to such facts.

A conversation of the general manager of the corporation defendant in a libel suit, tending to show his motive in publishing the alleged libelous article, is not a mere collateral matter; and evidence in rebuttal to show that the denial of such manager upon cross-examination, that such conversation took place, was untrue, is admissible to impeach his credibility as a witness in regard to the issue of malice. *Post Pub. Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. Rep. 530, 8 C. C. A. 201.

Likewise a witness who, on cross-examination, has testified that he has never been arrested or convicted of a crime, may, for the purpose of discrediting him, be contradicted by court records showing that he has been tried and convicted of a crime, the question whether or not a witness has been convicted of the crime not being a collateral one in the sense that the party cross-examining him is bound by his answer. *Helwig v. Lascowski*, 82 Mich. 619, 10 L. R. A. 378, 46 N. W. 1033.

As to impeachment by proof of conviction, see *supra*, subdivision C, § 4.

E. IMPEACHMENT OF ONE'S OWN WITNESS.

A party cannot impeach his own witness¹ by proof of bad character,² but may, in order to show what the facts are, contradict him by other evidence.³ But the rule has been extended in some states to permit impeachment where he is surprised, or entrapped into producing the witness,⁴ or his witness is or proves adverse,⁵ and in very many states to permit proof of inconsistent statements.⁶ For the last class of proof a foundation must be laid by interrogating the witness in regard thereto.⁷

The same rules are also applied in cases where an adverse party is put on the stand as a witness for the other party.⁸

However, a party is not bound by the evidence of a witness whom he is compelled to call, but may contradict and impeach him.⁹

¹*Nathan v. Sands*, 52 Neb. 660, 72 N. W. 1030; *Smith v. Dawley*, 92 Iowa, 312, 60 N. W. 625; *Fearey v. O'Neill*, 149 Mo. 467, 50 S. W. 918. An insurance agent called by the plaintiff in a suit upon the policy, to show that the assured was a subagent of the company to his knowledge

and had a manual of instructions to agents, cannot be impeached by the plaintiff as to facts testified to by him as a witness for defendant. *Smith v. Provident Sav. Life Assur. Soc.* 31 U. S. App. 163, 65 Fed. Rep. 765, 13 C. C. A. 284. Evidence tending to establish a bias on the part of the witness against the party calling him is testimony tending to impeach him which cannot be given by the party in whose favor the witness has been produced. *Re Mellen*, 56 Hun, 553, 9 N. Y. Supp. 929. A party cannot impeach a witness called by him by evidence of conversations had between himself and the witness. *Mason v. Corbin*, 88 Hun, 540, 34 N. Y. Supp. 773. And a witness for plaintiff who has testified on cross-examination to the truth of a circular issued by the defendant corporation, of which he is a member, cannot be contradicted by plaintiff by proof of contradictory declarations among members of the company. *Brush v. Manhattan R. Co.* 44 N. Y. S. R. 111, 17 N. Y. Supp. 540. But the rule that a party cannot be impeached by the party by whom he is called does not apply where it sought to disprove testimony drawn out on cross-examination by the adverse party. *Smith v. Utesch*, 85 Iowa, 381, 52 N. W. 343. And a party may show that her own witness was mistaken in reference to any matter favorable to her to which the witness has testified and elicit from him if possible the extent and character of his recollection. *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540.

In Texas it is provided by statute that the rule that a party introducing a witness shall not attack his testimony is so far modified as that a party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness. Cannot be impeached under Georgia statutes except where the party producing him is entrapped into so doing, but an adverse party made a witness may be impeached as though testifying in his own behalf.

A party who by the cross-examination of the witness of an adverse party as to a collateral matter makes such witness his own as to that matter, is bound by the testimony with reference thereto and cannot contradict it for the purpose of impeachment. *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Hill v. Froehlick*, 38 N. Y. S. R. 24, 14 N. Y. Supp. 610. And a check which it is claimed tends, in connection with other proof, to show that plaintiff's claim as to the time of commencement of services is untrue, is inadmissible to discredit him under the rule that a witness cannot be discredited as to an immaterial matter, where the defendant has made plaintiff his own witness and has proved by him that the check was given for work prior to the commencement of the services sued for, which defendant's own testimony does not contradict but rather tends to corroborate, and is therefore immaterial to the issues formed by the pleadings. *Hamilton v. Forsyth*, 77 Hun, 578, 28 N. Y. Supp. 1016. See *supra*, subdivision D, as to collateral and immaterial or irrelevant matter brought out on cross-examination.

See exhaustive note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418, on impeachment of one's own witness.

One who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from cross-examining him and discrediting him by proving his contradictory statements out of court. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 43 L. R. A. 676, 52 N. E. 1095. A party does not, by cross-examining a witness as to incidents attending the testimony given by him in chief, make him her own witness so as to prevent her from contradicting him as to a fact or circumstance to which he has not previously testified, stated by him in answer to a question which did not call therefor. *Colwell v. Colwell*, 14 App. Div. 80, 43 N. Y. Supp. 439. Plaintiff, in an action to recover rent under an original lease the possession or execution of which is denied by defendants, does not make an agent of defendants, to whom the lease was delivered, his own witness so as to preclude his contradiction, where he is compelled to call him to account for its nonproduction. *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731. But a party to an action who puts in evidence a deposition taken by the opposite party thereby makes the witness his own, within the rule relating to the contradiction of one's own witness. *McCormick Harvesting Mach. Co. v. Laster*, 81 Ill. App. 316. And one who, on cross-examination of a witness of an adverse party, prefers to rely upon, and reads, the testimony of such witness on his cross-examination on a former trial, thereby makes such witness, and consequently his testimony, his own. *Tourtlotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73. And a witness may be contradicted by the party taking his deposition where the deposition is introduced by the opposite party. *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068. But in *Salt Springs Nat. Bank v. Fancher*, 92 Hun, 327, 36 N. Y. Supp. 742, it is held that the plaintiff in an action to set aside a conveyance as fraudulent does not make the principal debtor his own witness by introducing in evidence his deposition taken in supplementary proceedings, so as to affect his right to cross-examine him and prove by him any facts pertinent to the issue, where he is afterwards called as a witness by defendants. And one does not make a witness of the adverse party his own by putting in evidence one of two depositions of such witness taken at the instance of the adverse party, for the purpose of impeaching him by showing statements therein contradictory to those in the other deposition used by the other party. *Thompson v. Gregor*, 11 Colo. 531, 19 Pac. 461.

*See statutes in Arkansas (except where it is indispensable to produce him), California, Indiana (except where it is indispensable to produce him or in case of manifest surprise), Indian Territory (except where indispensable to produce him), Idaho, Kentucky, Massachusetts, Montana, New Mexico, Oregon, Wyoming. And in Texas it is provided that a party producing a witness may attack his testimony in any other manner except by proof of his bad character. See note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418, on impeachment of one's own witness.

*See statutes in Arkansas, Florida (where witness proves adverse), Idaho, Indiana, Indian Territory, Kentucky, Massachusetts, Montana, Oregon, Wyoming. And in Texas it is provided that the party producing a wit-

ness may attack his testimony in any other manner except by proof of his bad character. *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 903; *Blackwell v. Wright*, 27 Neb. 269, 43 N. W. 116; *Price v. Lederer*, 33 Mo. App. 426; *First Nat. Bank v. Weston*, 24 App. Div. 230, 48 N. Y. Supp. 403; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Eastern Lumber Co. v. Gill*, 9 Pa. Co. Ct. 630; *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438; *Cassell v. First Nat. Bank*, 169 Ill. 380, 48 N. W. 701. A receiver of a corporation who produces books of account of the corporation to prove errors and falsifications of the accounts therein, upon the issue as to whether or not dividends were paid out of net earnings, is not estopped from contradicting entries therein, where he represents the creditors as well as the corporation. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203. And statements of plaintiff's witness on cross-examination by defendant, that he received no authority from the defendant to order the particular goods from plaintiff for which the latter is seeking to recover, does not qualify his testimony as to the facts showing a general authority to order goods, so as to conclude the plaintiff by the question of his authority to buy the goods in question. *Bannon v. Levy*, 20 Misc. 581, 46 N. Y. Supp. 353. The testimony by a witness for the defendant, that a claim sought to be recovered in offset by the defendant was assigned to the defendant in trust for the benefit of a third person, does not preclude the defendant from showing that by a subsequent arrangement the assignment was made to him individually. *First Nat. Bank v. Post*, 66 Vt. 237, 28 Atl. 989. In an action upon a promissory note, where the defense is that the signature was forged, a witness who, upon a former trial, testified for the plaintiff that he was present and saw the note signed by the alleged maker upon a certain day at a certain time and place, may, when such evidence is withheld by the plaintiff, be called by the defendant, who will not be bound by his testimony but may show by other witnesses that the alleged maker was elsewhere on the day named. *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195.

While a party may not discredit his own witness by direct impeaching testimony, he is not bound by his testimony. *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109. But he may be contradicted. *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Darling v. Thompson*, 108 Mich. 215, 65 N. W. 754. And the doctrine that a party may contradict, though not impeach, his own witness, is applicable where he is himself the witness, where the circumstances are consistent with honesty and good faith. *Hill v. West End Street R. Co.* 158 Mass. 458, 33 N. E. 582. Although a party calling a witness cannot impeach his character for truth and veracity generally, he may show that the whole or any part of his testimony is untrue, either by his own examination and the improbability of his story, or by other evidence contradictory of the evidence of such witness so far as that evidence is material. *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361.

Under the Georgia statutes a party cannot impeach his own witness except where he is entrapped. So, a party cannot impeach his own witness without showing that he was entrapped into offering him as a witness. *State use of Guthrie v. Martin*, 52 Mo. App. 511. See also

Fearey v. O'Neill, 149 Mo. 467, 50 S. W. 918; *Dunlap v. Richardson*, 63 Miss. 447. In *Smith v. Dawley*, 92 Iowa, 312, 60 N. W. 625, it is held that a party cannot impeach his own witness, although he has been misled as to what her testimony would be. But this would seem to be contrary to the general rule. See also *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334, in which it is said that if the witness has made to the party calling him, or to his attorney, a statement totally variant from his sworn testimony, and on the faith of such statement he has been called, such statement may be proved, not for the purpose of impeaching his general character, but for the protection of the party calling him, in the discretion of the court. In *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577, it is held that the rule permitting a party to contradict his own witness, being statutory, applies only where the testimony given is a surprise to the party calling him and is prejudicial. See also *Oldfather v. Zent*, 21 Ind. App. 307, 52 N. E. 236 (and does not apply where the witness merely fails to testify as expected, *dictum*). The denial by a witness for defendant in an action for slander imputing unchastity, of improper relations with the plaintiff, is not prejudicial to the defendant so as to permit him to contradict such witness by proof of his prior declarations that such relations had existed, under the Indiana statute permitting the contradiction of one's own witness only where the testimony is a surprise and prejudicial. *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577. So, mere failure of a witness to testify to facts sought to be proved by her, by denial of knowledge thereof, is not prejudicial to the party calling her so as to permit her impeachment by proof of statements made by her as to such facts which she denies making, under the Indiana statute. *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. And a party cannot impeach the testimony of his own witness contained in a deposition by showing his contradictory statements made out of court, where there is no element of surprise or imposition justifying it. *Dunn v. Dunnaker*, 87 Mo. 597.

- ▲ A party who calls as a witness the son-in-law of the adverse party cannot contradict him or impugn his credibility by showing that in an examination by his attorney, which was not, however, for the preparation of the case for trial, he made statements inconsistent with his testimony, as he should have expected the witness to be friendly to the other party and cannot be considered as taken by surprise. *Ernhart v. Hiller*, 16 Lanc. L. Rev. 51. And so, a witness called to prove a note a forgery, although she has all along been insisting that it was genuine, cannot, upon testifying adversely to the party calling her, be impeached by such party by proof of bad character, under Indiana Rev. Stat. 1881, § 507, providing that a party cannot impeach his own witness by such proof unless it was indispensable that the party should produce him, or in case of manifest surprise. *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87.
- ▲ A witness whose testimony has been merely weakened by his admission on cross-examination of having made an affidavit somewhat modifying his testimony on direct examination, cannot, on redirect examination, be interrogated with regard to his testimony in another case inconsistent

with such affidavit, merely for the purpose of giving strength and color to his present direct testimony, as the rule permitting such examination in case of surprise does not extend to such surprise of cross-examination in regard to declarations inconsistent with affidavits used to weaken perfectly consistent direct testimony. *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850.

See also note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418, 424.

*Thus, the right to show inconsistent statements is limited to where the witness proves adverse, by the Alabama statutes, and where, in the opinion of the judges, he proves adverse, in the New Mexico statutes, and under the Vermont statutes, where in the opinion of the court he is adverse, the party producing him may, by leave of court, show inconsistent statements.

The determination as to whether or not a witness is so adverse to the party producing him as to authorize the latter to impeach him under the Florida statutes is largely in the discretion of the trial judge. *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847. A party may contradict the adverse testimony of his own witness on a matter directly at issue. *Cruse v. Findlay*, 16 Misc. 576, 38 N. Y. Supp. 741. So, a party surprised by adverse testimony of his own witness may, in the discretion of the court, be allowed, after proper preliminary proof, to show that the witness had previously made statements contrary to his testimony. *Selover v. Bryant*, 54 Minn. 434, 21 L. R. A. 418, and note p. 423, 56 N. W. 58. So, a party may contradict the testimony of an adverse party although he himself introduced such testimony. *Cook v. Carroll Land & Cattle Co.* (Tex. Civ. App.) 39 S. W. 1006 (see *infra*, note 8, as to adverse party). And unlooked-for statements of a hostile witness are not ordinarily binding upon the party calling him. *Lewis v. Baker*, 162 Pa. 510, 29 Atl. 708. So, one who calls an adverse witness has a right to contradict him by testimony of other witnesses, in order to give material evidence upon an issue in the case. *Mack v. Austin*, 26 Misc. 198, 55 N. Y. Supp. 466. A party who puts an adverse witness on the stand is not concluded by his testimony, but may contradict it and show by his examination that he is mistaken. *Hard v. Densmore*, 28 App. Div. 365, 51 N. Y. Supp. 157.

*See statutes in Alabama (in case witness proves adverse), Arkansas, Idaho, Indiana, Indian Territory, Kentucky, Massachusetts, Montana, New Mexico (where witness in the opinion of the judges proves adverse), Oregon, Vermont (when in the opinion of the court a witness is adverse he may by leave of court show the witness's inconsistent statements), and Wyoming. And under the Texas statutes a party may attack the testimony of his own witness in any other manner, except by proof of bad character.

▲ party who has been misled as to what his own witness will testify to may impeach such witness by showing former statements contradictory to his testimony. *Southwestern Coal & Improv. Co. v. Rohr*, 15 Tex. Civ. App. 404, 39 S. W. 1017. So, a party surprised by adverse testimony of his own witness may, in the discretion of the court, be allowed, after proper preliminary proof, to show that the witness had previously made

statements contrary to his testimony. *Selover v. Bryant*, 54 Minn. 434, 21 L. R. A. 418, 56 N. W. 58. And testimony of a witness for defendant on cross-examination, that he does not know that he had made different statements as to the defective condition of his engine from those given at the trial, may be contradicted by plaintiff, although the witness was called as such by both parties, under Ind. Rev. Stat. 1894, § 515, providing that a party may contradict his own witness by showing that he has made different statements. *Ohio & M. R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246. And a party whose witness testifies to a fact prejudicial to him, though he does not remember having made contradictory statements on a former occasion before a coroner, may contradict him by showing by other witnesses that he did make such statement. *Wren v. Louisville, St. L. & T. R. Co.* 14 Ky. L. Rep. 324, 20 S. W. 215. So, if a witness has made to the party who calls him, or to his attorney, a statement totally variant from his sworn testimony, and on the faith of such statement he has been called, he may be asked if he made such statement, and if he denies it, such statement may be proved, not for the purpose of impeaching his general character, but for the protection of the party calling him, in the discretion of the judge. *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334. And a plaintiff in an action for slander in charging that silk furnished by him to his workmen contained arsenic, resulting in workmen leaving his employ, who has called a witness to show that the machine of a workman was removed from her house after such words were spoken, may contradict the testimony of such witness, that she does not fix the time such words were spoken, by evidence that on a former trial she testified that the words were spoken before such machine was removed and the workmen stopped work. *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299. A party who calls a witness whose testimony not only fails to prove, but wholly disproves, his case, may ask him if he has not made a statement to him conflicting with his testimony and which, if true, would tend to prove his case. *George v. Triplett*, 5 N. D. 50, 63 N. W. 691.

One who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on the trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from examining him and discrediting him by proving his contradictory statements out of court. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 43 L. R. A. 676, 52 N. E. 1095.

A party who, on the issue of fraud in the making of an assignment, calls the assignor as a witness, may nevertheless show that a portion of his witness's evidence is untrue by comparing it with other portions of his evidence. *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701.

And plaintiff who has taken the deposition of the defendant and read some portions of it in evidence, the remainder being read by defendant, is not precluded from introducing declarations of the defendant contradictory of the statements in his deposition, as, under N. Y. Code Civ. Proc. § 838, providing that the testimony of a party taken at the instance of the adverse party may be rebutted by other evidence, plaintiff may prove the fact of his case by any competent evidence, although such

evidence may operate to contradict statements in defendant's deposition. *Kelly v. Jay*, 79 Hun, 535, 29 N. Y. Supp. 933. But a party cannot offer proof of prior contradictory statements by the witness called by him, although such witness is a reluctant one, where the only effect is to impeach the witness, and not to give material evidence on any issue in the case. *Ontario v. Union Bank*, 21 Misc. 770, 47 N. Y. Supp. 927 (modified on other point in 52 N. Y. Supp. 328).

While a party may not impeach his own witness, yet where he is disappointed in his witness or surprised he may ask him as to contradictory statements made by him for the purpose of probing his recollection. *Humble v. Shoemaker*, 70 Iowa, 223, 30 N. W. 492; *Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 67 N. W. 227 (particularly where it is evident that he is inclined to shape his testimony to aid the adverse party); *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249 (but he cannot prove such statements by other witness). But a witness whose testimony has been merely weakened on cross-examination by his admission of having made an affidavit somewhat modifying his testimony on direct examination cannot be asked on redirect examination with reference to his testimony in another case where the party calling him is not surprised by his testimony, the witness is not hostile, and the statements in such other case are not inconsistent with his present testimony, as he does not come within the rule that where a party calling a witness is surprised by testimony contrary to his expectations he may interrogate him as to previous declarations inconsistent with his testimony for the purpose of probing his recollection, recalling to his mind statements he has previously made, and drawing out an explanation of his apparent inconsistency. *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850. And defendant's counsel is properly refused permission to exhibit to defendant's witness, who has testified that he did not hear a switch tender warn the plaintiff of the approach of the train by which he was struck, a paper signed by the witness a few days after the accident, made out from his verbal statements to some of the officers of the defendant, from which it appears that he did hear such warning, where the witness, after having the fact that he made the written statement called to his attention, still expressed his opinion that he did not hear any such warning. *Pittsburg, C. C. & St. L. R. Co. v. Lewis*, 18 Ky. L. Rep. 957, 38 S. W. 482.

A witness who merely denies making statements out of court favorable to the party producing him cannot be contradicted by proof of such statements under the provision of the Oregon Civil Code permitting the party producing a witness to contradict him by other evidence and to show that he has made at other times statements inconsistent with his present testimony, as that provision is intended only to prevent the party from being prejudiced by the evidence of his own witness and was not intended to permit inquiries about matters regarding which the witness does not testify, or gives unsatisfactory testimony, and the giving of proof of his statements in reference thereto at another time. *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.

That a party cannot discredit or contradict his own witness by proof of

contradictory statements, see *Dunlap v. Richardson*, 63 Miss. 447 (unless shown to be deceived by the fraud or artifice of the witness); *Re Kennedy*, 104 Cal. 429, 38 Pac. 93 (although the witness has not testified as he led the party to believe he would); *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499 (by proof of subsequent contradictory statements although he may show fact to which he testifies is different). So, the husband of plaintiff in an action to recover moneys alleged to have been placed in the hands of defendant's intestate as plaintiff's agent, who testifies in chief to facts tending to show that deceased received the money and agreed to manage it as plaintiff's agent, and denies on cross-examination that he had stated that deceased had paid it back, cannot be contradicted or impeached by proof that he had in fact made such statements. *Lamb v. Ward*, 114 N. C. 255, 19 S. E. 230. And that a party cannot impeach his own witness by proof, through other witness, of contradictory statements, where the witness is not one whom the law obliges the party to call, see *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249.

A party who voluntarily calls a witness cannot impeach him by proof of statements made in another action contradictory of his testimony. *Collins v. Hoehle*, 99 Wis. 639, 75 N. W. 416. And a tenant sued jointly with his landlord, who is called by plaintiff and testifies that he was not the landlord's agent in entering into the contract sued on, cannot be impeached by showing that he made former contradictory statements. under Vermont Rev. Laws, § 1009, providing that a party to a civil action or proceeding may compel an adverse party to testify as a witness in his behalf "in the same manner and subject to the same rules as other witnesses." *Good v. Knox*, 64 Vt. 97, 23 Atl. 520.

See note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418, 426.

In the statutory provisions of Florida, Massachusetts, New Mexico, Vermont, and Wyoming, there is special provision made for the laying of a foundation, although the general provision in the other statutes that a foundation must be laid for impeaching a witness by proof of inconsistent statements would seem necessarily to apply to a party's own witness, as well as to a witness of the adverse party. See note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418, 428. See also cases *supra*, subdivision A, §§ 1 and 2.

Thus a party who calls the adverse party is bound by his testimony. *Fearey v. O'Neill*, 149 Mo. 467, 50 S. W. 918. And cannot impeach him. *Graves v. Davenport*, 50 Fed. Rep. 881 (by proof of prior inconsistent statements); *United States L. Ins. Co. v. Kielgast*, 26 Ill. App. 567 (by proof of contradictory statements); *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486 (cannot question their general credibility); *Dravo v. Fabel*, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170 (although not concluded, cannot contend that defendant is unworthy of credit). But that a party may contradict the testimony of an adverse party although he himself introduced such testimony, see *Cook v. Carroll Land & Cattle Co.* (Tex. Civ. App.) 39 S. W. 1006. But he cannot discredit his evidence and is concluded by it, unless a different state of facts in re-

gard to the subject of it is established by other competent evidence. *Tourteltotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73.

But in Georgia it is provided by statute that the opposite party may be made a witness and he may be impeached as though testifying in his own behalf. And in Wisconsin it is provided that the adverse party, or the agent or officer of a corporation, etc., may be examined as if under cross-examination, at the instance of the opposite party, but the party calling for such examination shall not be concluded thereby and may rebut the evidence given thereon by counter or impeaching testimony. So, in New Hampshire, the statute provides that when one party offers the testimony of the nominal or real adverse party he is not thereby precluded from cross-examining, contradicting, or impeaching him. So, also, under the Ohio statutes a party may be examined as if under cross-examination, as any other witness, but the party calling for such examination is not concluded thereby but may rebut it by counter-testimony.

But although he cannot impeach him, he may dispute or contradict him as to the facts. *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 133; *Helms v. Green*, 105 N. C. 251, 11 S. E. 470; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Rindskoph v. Kuder*, 145 Ill. 607, 34 N. E. 484; *Chester v. Wilhelm*, 111 N. C. 314, 16 S. E. 229. Thus, plaintiffs in an action to set aside a mortgage as in fraud of creditors, who made a defendant their witness, are not precluded from showing by other witnesses that the transaction was fraudulent and for the purpose of defrauding the creditors of the witness, and that defendants participated in the fraud, although defendant testified to the good faith of the transaction. *Imhoff v. McArthur*, 146 Mo. 371, 48 S. W. 456. And a plaintiff who has taken the deposition of defendant and read some portion of it in evidence, the remainder being read by defendant, is not precluded from introducing declarations of the defendant contradictory of the statements in his deposition, as, under New York Code of Civil Procedure, § 838, providing that the testimony of a party taken at the instance of the adverse party may be rebutted by other evidence, plaintiff may prove the facts of his case by any competent evidence, although such evidence may operate to contradict the statements in defendant's deposition. *Kelly v. Jay*, 79 Hun, 535, 29 N. Y. Supp. 933. So also, where the plaintiff, whose ownership of notes sued on is denied, is called as a witness by defendant, and testifies that she had contributed out of her separate earnings a certain part to the purchase of the note, and that her father furnished the balance, defendant is not precluded from showing that her husband owned the note. *Gardner v. Connelly*, 75 Iowa, 205, 39 N. W. 650.

Plaintiff by the introduction in evidence of the ante-trial examination of defendant, even though it may as to part thereof make him his own witness, is not thereby precluded from directly and specifically negating part of such examination where that is the only possible way of establishing a different state of facts, and such evidence is not objectionable as impeaching the witness. *Crocker v. Agendroad*, 122 Ind. 585, 24 N. E. 169.

And a check which it is claimed tends, in connection with other proof, to show that plaintiff's claim as to the time of commencement of services is untrue, is inadmissible to discredit him under the rule that a witness cannot be discredited as to an immaterial matter, where the defendant has made plaintiff his own witness and has proved by him that the check was given for work prior to the commencement of the services sued for, which defendant's own testimony does not contradict but rather tends to corroborate, and is therefore immaterial to the issues formed by the pleadings. *Hamilton v. Forsyth*, 77 Hun, 578, 28 N. Y. Supp. 1016.

The declarations of a party to the suit in the nature of admissions are of course admissible as admissions, and even have been held admissible for the purpose of impeachment. See discussion under subdivision A, § 1, note 2, *supra*, as to the laying of a foundation therefor. And in all states where proof of inconsistent statements is permitted as to one's own witness, the rule would be applicable to a party so called. See *supra*, note 6.

*Thus, an attesting witness whom the party is obliged to call may be impeached. *Thompson v. Owen*, 174 Ill. 229, 45 L. R. A. 682, 51 N. E. 1046; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899. But not where the witness is one the party is not obliged to call. *Dickson's Estate*, 20 Pa. Co. Ct. 152. See also *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249.

And he may of course contradict such a witness. *Funke v. Cone*, 65 Mich. 581, 32 N. W. 826 (assignor called by complainants in an action to enforce a trust under general assignment may be contradicted when necessary to ascertain the facts). A party who is compelled by a ruling of the court to call an adverse witness to give testimony that might have been called out on cross-examination is not bound by his statements, but may contradict them by other witnesses. *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788. And plaintiff compelled, in an action to recover rent under a written lease the possession or execution of which is denied by the defendants, to call as a witness their agent, to whom it has been delivered, to account for the nonproduction of the paper, does not thereby make such witness his own so as to preclude his contradiction. *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731.

And may impeach him by proof of bad character. See statutes of Indian Territory, Indiana, Arkansas, and Kentucky, which provide that a party cannot impeach his own witness by proof of bad character except where it is indispensable to produce him.

F. CORROBORATION OF IMPEACHED WITNESS.

As a general rule, a witness whose credibility has not been attacked cannot be sustained by corroborative evidence.¹ But where his credibility has been directly attacked by proof as to character or facts affecting it, evidence is admissible to sustain him in respect thereto.² As to whether general good character or reputation for truth and

veracity may be shown where a witness has been impeached by proof of contradictory statements the authorities are divided.³ Prior statements consistent with present testimony are usually inadmissible as sustaining evidence,⁴ unless it has been charged that such present testimony is the result of recent fabrication or given under the influence of a motive which did not exist at the time of the making of such prior statements.⁵ A witness may sometimes be corroborated by collateral documentary evidence or collateral testimony.⁶

The sustaining witness must, in order to testify as to character, show his knowledge thereof.⁷

¹In some states it is provided by statute that, where character is not involved, sustaining evidence as to good character is inadmissible until the witness has been impeached. See statutes of Arkansas, California, Idaho, Indian Territory, Kentucky, Montana, and Oregon. And in Georgia it is provided that a witness impeached by proof of contradictory statements may be sustained by proof of general good character. See *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *American F. Ins. Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. 253. And so, evidence as to the good character of a witness for truth and veracity and fair dealing is not admissible when his general character is not assailed, although the case may turn upon the credit given to his testimony. *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050.

Nor is evidence in support of the character of a witness admissible before impeaching evidence has been adduced by the adverse party, and cannot be so introduced for the convenience of nonresident witnesses who are to give the supporting evidence. *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18. But in *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, it is held that the admission of corroborative evidence before the putting in of impeaching evidence is not error requiring the reversal of the judgment, where the objecting party subsequently introduced impeaching evidence authorizing the introduction of such corroboration.

Evidence of the general good reputation in the community where he lives, of plaintiff in an action for slander, is inadmissible to sustain him, where it is questioned in no way but by inquiries made upon cross-examination as to specific facts that may tend to weaken his good character. *Hitchcock v. Moore*, 70 Mich. 112, 37 N. W. 914. And evidence to sustain the character of a witness for truth is not admissible where no attack has been made on his character, although he has been cross-examined with a view to showing that the injury complained of had probably been sustained by him before the accident under investigation. *Reynolds v. Richmond & M. R. Co.* 92 Va. 400, 23 S. E. 770. Likewise it is held in *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050, that questions asked a witness for defendant upon cross-examination in an action upon a fire insurance policy, concerning an attempted barter of the knowledge he possessed of the burning of the

property insured, tend to show his bias towards the defendant and to discredit his testimony, but did not impeach his general character so far as to let in testimony of his good reputation for truth and fair dealing.

Nor is the character of a witness for defendant railroad company put in issue so as to authorize the introduction of evidence as to his character for veracity by an allegation in plaintiff's petition, and testimony in support thereof to the effect that such witness, as agent for defendant, committed an assault which resulted in the death of plaintiff's intestate. *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644.

Mere conflict or contradiction between the testimony of witnesses is no ground for admitting sustaining evidence of general good character or character or reputation for veracity. *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36; *Saussy v. South Florida R. Co.* 22 Fla. 327; *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697; *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425; *Tedens v. Schumers*, 112 Ill. 267; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *Brann v. Campbell*, 86 Ind. 516; *Pruitt v. Cox*, 21 Ind. 15; *Miller v. Western & A. R. Co.* 93 Ga. 480, 21 So. 52; *Owens v. White*, 28 Ala. 413. So, a witness whose character is attacked only by an inference of fraud, immorality, or crime, arising as a consequence of a contradiction of his testimony upon an issue in the case, cannot be supported by proof of good character. *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87. Nor is the mere fact of such conflict or contradiction ground for the admission of prior consistent statements for the purpose of corroboration. *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692; *Berlin v. Kern*, 6 Northampton Co. Rep. 299.

But in *San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584, it is held that a plaintiff may introduce in rebuttal testimony confirmatory of his testimony in chief upon a point in issue, when defendant has introduced evidence in opposition to his testimony in chief.

As to corroboration in case of proof of contradictory statements, see *infra*, note 3.

*Thus, a witness whose character has been attacked by proof of specific acts can sustain himself by proof of his general good character since such acts were committed. *Central R. & Bkg. Co. v. Dodd*, 83 Ga. 507, 10 S. E. 206. And the good character of a witness who, upon cross-examination, admits his conviction and confinement in a penitentiary for a crime involving moral turpitude, may be established by the party calling him by evidence of his general reputation for truth. *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671. A witness impeached by proof of conviction of a crime may be sustained by evidence of his reputation for truth. *Gertz v. Fitchburg R. Co.* 137 Mass. 77, 50 Am. Rep. 285. And an ex-convict may be permitted to testify that he was a "trusty," as an offset to his conviction. *Tennessee Coal, I. & R. Co. v. Haley*, 52 U. S. App. 560, 85 Fed. Rep. 534, 29 C. C. A. 328. Plaintiff in a libel suit may rebut evidence of his bad reputation for integrity in politics by proof of his general character for integrity. *Post Pub. Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. Rep. 530, 8 C. C. A. 201. So, the offer

in evidence by defendant in an action for personal injuries, of the doctor's receipt, for the purpose of contradiction by showing that it was written by the plaintiff whose arm was injured, and whose testimony as to who dressed his arm and the giving of the receipt by the doctor was drawn out on cross-examination and is irrelevant to the issue, is an attack upon the character of plaintiff for truth and honesty which authorizes the introduction of evidence of his general reputation for truth and veracity. *Texas & P. R. Co. v. Raney*, 86 Tex. 363, 25 S. W. 11. And where there is introduced the certified copy of conviction of perjury of a party examined in his own behalf, which contains a statement that a copy of a pardon was filed, he is entitled to show the circumstances under which the pardon was granted. *Sisson v. Yost*, 35 N. Y. S. R. 136, 12 N. Y. Supp. 373. And proof of declarations of a party as to his own witness to the effect that he was perfectly good but sometimes a little slippery, and that he could not rely upon what he told him and could place no confidence in what he said, is an impeachment of his witness's character for truth and veracity which authorizes the introduction of sustaining evidence that his character for truth and veracity is good. *Prentiss v. Roberts*, 49 Me. 127. See also *supra*, note 1.

But in the criminal case of *People v. Gay*, 7 N. Y. 378, it is held that testimony brought out on cross-examination of a witness, that he has been prosecuted for perjury and was committed to jail for trial, is not impeachment of his general character for truth which will authorize the introduction of sustaining evidence as to general good character of the witness for truth. And in *Hannah v. McKellip*, 49 Barb. 342, it is held that proof of general character for truth and veracity is inadmissible to sustain a witness sought to be impeached only by asking him on cross-examination as to his having been charged with false swearing.

*That a witness may be so sustained, see *Louisville, N. A. & C. R. Co. v. Frauley*, 110 Ind. 18, 9 N. E. 594; *Carroll County Comrs. v. O'Connor*, 137 Ind. 622, 35 N. E. 1006; *Berryman v. Cox*, 73 Mo. App. 67; *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209. But in the criminal case of *State v. Cooper*, 71 Mo. 442, it is held that such evidence is not admissible after the witness has been asked as to the making of certain statements, but before evidence has been introduced to contradict him. In Georgia it is provided by statute that a witness impeached by proof of contradictory statements may be sustained by proof of general good character. See also *Clark v. Bond*, 29 Ind. 555; *Isler v. Dwey*, 71 N. C. 14; *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23; *Hadjo v. Gooden*, 13 Ala. 718. And see the criminal cases of *Towns v. State*, 111 Ala. 1, 20 So. 598; *Holley v. State*, 105 Ala. 100, 17 So. 102; *Mercer v. State*, 40 Fla. 216, 24 So. 154. And in *George v. Pilcher*, 28 Gratt, 299, 26 Am. Rep. 350, in which, however, the impeachment was by cross-examination and the disproving by another witness of a material fact, it is said that whenever the character of a witness for truth and veracity is attacked either by direct evidence of want of truth, or by cross-examination or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him

in his examination, or in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth.

But to the contrary, see *Russell v. Coffin*, 8 Pick. 143; *Brown v. Mooers*, 6 Gray, 451; *Wertz v. May*, 21 Pa. 274; *Chapman v. Cooley*, 12 Rich. L. 654; *Vance v. Vance*, 2 Metc. (Ky.) 581; *Sheppard v. Yocum*, 10 Or. 402, Overruling *Glaze v. Whitely*, 5 Or. 164; *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050; *Gulf, C. & S. F. R. Co. v. Younger* (Tex. Civ. App.) 40 S. W. 423. But in criminal cases in Texas the courts have held that a witness may be so corroborated. *Ledbetter v. State* (Tex. Crim. Rep.) 29 S. W. 479; *Tipton v. State*, 30 Tex. App. 530, 17 S. W. 1097; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444.

See further *State v. Rice*, 49 S. C. 418, 27 S. E. 452; *Webb v. State*, 29 Ohio St. 351; *Frost v. McCargar*, 29 Barb. 617; *People v. Bush*, 65 Cal. 129, 3 Pac. 590. And in *People v. Hulse*, 3 Hill, 309, it was held that in a prosecution for rape an attempt to discredit the testimony of the complainant by showing on her cross-examination that her story was improbable in itself, by disproving some of the facts she testified to, by evidence of her conduct inconsistent with the idea of the offense having been committed, and by calling witnesses to show that the account she had given out of court did not correspond with her statements under oath, was not an attack upon her character authorizing the introduction of evidence of general good character to sustain her.

In *Garr, S. & Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811, it is held that in an action for replevin evidence cannot be given to sustain the character of one who has become a party by cross action for the return of certain items of the property, where her testimony has been impeached by admissions made by her out of court contrary to her evidence on the trial, because such admissions bind no one but her and are not admissible in the part of the action to which she is not a party, and as to her are not impeaching, but original evidence against her which does not authorize the introduction of such sustaining evidence.

Mere conflict or contradiction between witnesses does not usually authorize the introduction of sustaining evidence. See *supra*, note 1.

**Marx v. Leinhauff*, 93 Ala. 453, 9 So. 818; *Adams v. Thornton*, 82 Ala. 260, 3 So. 20 (testimony on former trial); *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803; *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692; *Clever v. Hilberry*, 116 Pa. 431, 9 Atl. 647; *Rhutael v. Stephens*, 68 Iowa, 627, 27 N. W. 786; *Dudley v. Bolles*, 24 Wend. 465. So, statements made by a judgment debtor at a remote period, to the same effect as his testimony, are inadmissible in an action by one whose title is claimed to have been acquired in fraud of creditors, to recover property seized by the sheriff under a writ, for the purpose of contradicting the effect of statements inconsistent with his testimony, or of impeachment of bad character. *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213. And evidence that a witness whose testimony is admitted to be true made statements out of court similar to what he has testified to is inadmissible to rebut contradictory statements which he admitted he had made on several occasions out of court, or to corroborate his testimony as

given. *Lavigne v. Lee*, 71 Vt. 167, 42 Atl. 1093. Where a stenographer has testified that a witness had testified differently before an auditor, it is not permissible to show that in another action he had testified in the same way as at the present trial. *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398. See further *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

The general rule is stated in *Silva v. Pickard*, 10 Utah, 78, 37 Pac. 86, and *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4, to be that the declarations of the party made out of court are not admissible to corroborate his sworn testimony, except in extreme cases where their rejection would work a real and manifest wrong; and in no case should they be admitted if it appears that he had any interest or motive in making them, if he was subject to disturbing influences, or if the ultimate effect and operation arising from a change of circumstances could have been foreseen. And proof of prior statements of a witness consistent with his present testimony are not rendered admissible to corroborate him by the introduction of evidence of inconsistent statements made by him, where it does not appear that at the time of the making of such prior statements he stood in any different relation to the cause than he now stands. *Reed v. Spaulding*, 42 N. H. 114.

And where there is no evidence tending to show that the witness's present testimony is a fabrication of recent date, evidence of consistent statements is inadmissible to support him. *Crooks v. Bunn*, 136 Pa. 368, 20 Atl. 529; *Bradley v. Freed* (Tenn. Ch.) (Affirmed by Sup. Ct.) 51 S. W. 124; *Loomis v. New York, N. H. & H. R. Co.* 159 Mass. 39, 34 N. E. 82; *Stolp v. Blair*, 68 Ill. 541. A witness contradicted as to a material point of his testimony and by proof of a statement out of court inconsistent with his testimony cannot be corroborated by a letter purporting to show a statement of the matter similar to his present testimony, where it does not appear that the letter was written when the transaction was recent, nor does it appear but that it might have been prepared with direct reference to the litigation. *Robb v. Hackley*, 23 Wend. 50. Evidence that a witness had previously told the same story that he tells on the stand is not admissible in corroboration where his credibility is attacked on the ground that he had attempted to blackmail a third person, since such unsuccessful attempted blackmail would not tend to create and show malice against a party to the suit within the rule that where a witness's credibility is attacked for alleged ill-will or corrupt motive, similar statements made previous to the existence of such ill-will or motive are admissible in corroboration. *Train v. Taylor*, 51 Hun, 215, 4 N. Y. Supp. 492. And evidence of prior declarations made shortly after the occurrence and long before the testimony is given on the trial, which testimony is contradicted by proof of prior inconsistent declarations, is inadmissible in corroboration thereof where the contradiction simply goes to the credit to be given to the recollection of the witness, as such evidence is admissible in corroboration only where the testimony on the trial is charged to be a fabrication made out of whole cloth under the influence of a motive which has come to operate since the occurrence. *Dechert v. Municipali*

Electric Light Co. 39 App. Div. 400, 57 N. Y. Supp. 225. So, a witness whose credibility has been affected by evidence merely that he was not present at a certain accident, to the details of which he testifies, cannot be sustained by proof of an unsworn statement made by him shortly after such accident to the effect merely that he was present thereat, but in which none of the details were related and which therefore in no way tends to corroborate him as to such details, as he does not come within the rule that where a witness has been impeached by testimony tending to show corrupt motives and fabrication the fact that he has made the same statements shortly after the occurrence and before a motive to fabricate existed can be shown as tending to support his integrity and the accuracy of his recollection. *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252.

Statements made by members of an association to a bank as to the passage of a resolution limiting the purchase of wool by the association to a certain amount for a designated year, by which the bank was induced to extend further credit, are inadmissible in corroboration of evidence that such resolutions had been passed, as their own interest was being served at the time by making such statements. *Silva v. Pickard*, 10 Utah, 78, 37 Pac. 86. But in *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272, it is held that where it is sought to impeach a witness by proving former contradictory statements, confirmatory statements previously made cannot be excluded on the ground that they are self-serving declarations.

In *Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 22, 28 S. W. 1027, it is held, however, that in an action on a fire insurance policy a witness who has testified that the insured attempted to hire him to burn the insured property may be supported by evidence that he had made similar statements before, where his testimony is directly contradicted and evidence introduced that he had stated that detectives had been trying to get him to swear to the statements testified to by him.

A witness who on cross-examination states that he can think of no other reason for failing to testify on his first examination to a fact testified to by him when recalled than that he forgot such fact and afterwards saw it in the minutes taken in a previous examination, may be supported by introducing in evidence the part of such minutes showing that he testified as stated by him. *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

In North Carolina it is held that a witness whose testimony is impeached may be corroborated by showing that he has previously made similar statements about the transaction. *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760. See also *Burnett v. Wilmington, N. & N. R. Co.* 120 N. C. 517, 26 S. E. 819 (and the witness himself is competent to testify to the consistent statements); *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 544, 26 S. E. 922 (written statement signed soon after occurrence of accident).

See *supra*, subdivision A, § 1, note 3, as to giving opportunity for explanation.

Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307; *Lewy v. Fischl*, 65 Tex. 311; *McLain v. British & F. M. Ins. Co.* 16 Misc. 336, 38 N. Y. Supp. 77; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Baber v. Broadway & S. Ave. R. Co.* 9 Misc. 20, 29 N. Y. Supp. 40; *Herrick v. Smith*, 13 Hun, 448; *French v. Merrill*, 6 N. H. 465.

Thus, where on cross-examination the defendants seek to impeach a mortgagee by showing that she paid no consideration for the mortgage, as she testified, her bank book is admissible in support of her statement as to the payment of such consideration. *Wright v. Towle*, 67 Mich. 255, 34 N. W. 578. And likewise in *Harbison v. Hall*, 124 N. C. 626, 32 S. E. 964, it was held that evidence in an action for goods sold and delivered, of the system of entries in the vendor's books when checks and money were received, and that an investigation of the books failed to show any evidence of payment, is admissible to corroborate their testimony that the account is unpaid, where the vendee testified that he has paid the entire amount.

But in *New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co.* 59 N. J. L. 189, 35 Atl. 915, it is held that books of science referred to by a witness on cross-examination as partly the basis of his opinion, are inadmissible to corroborate him. And that a witness cannot be corroborated on a hearing before the police commissioners of a city of charges preferred against a member of the police force, as to facts stated by her, by entries made in her own books,—especially where they are suspicious in themselves because no such books were kept until just previous to the transaction in question, see *Re Smith*, 85 Hun, 359, 32 N. Y. Supp. 943. And a memorandum made by the cashier of a bank as to the nature of a transaction by which a note was received by the bank, vouched for by no one but himself, is inadmissible to establish his credibility after the introduction of his contradictory testimony on a former trial in regard to such transaction. *State Nat. Bank v. Weed*, 39 App. Div. 602, 57 N. Y. Supp. 706.

Where a person on cross-examination has testified to the contents of a written order, the order may be properly introduced to sustain what he has said about its contents. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761. And where defendant testified in his own behalf that a part of the consideration of a note was \$2,400, the purchase price of the land in controversy, and his testimony was impeached, it was competent, for the purpose of corroborating him, to admit in evidence a deed made not many years before to a person under whom the plaintiff claimed, in which the consideration was stated to be \$2,400. *Hinton v. Pritchard*, 98 N. C. 355, 4 S. E. 462.

Testimony of a juror that a witness did not give certain testimony on the trial of the case is admissible to corroborate such witness, who has denied making those statements, on cross-examination, after other witnesses have testified that he did make them. *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174. And where plaintiff has testified that a third person stated that defendant set fire to a building, in the presence of the latter, who made no response, and this third person being sworn in defendant's behalf having denied making the statement, plaintiff,

to support his own credit, may prove by another witness that he was present and heard the statements by defendant's witness to which plaintiff testified. *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64.

Evidence, however, that a company sued by a servant for injuries sustained in its employment was protected by insurance against loss from accidental injuries suffered by its workmen, offered as tending to prove that its general manager had no motive to testify untruthfully, is inadmissible when it is not shown that he knew of the fact of such insurance. *McQuillan v. Willimantic Electric Light Co.* 70 Conn. 715, 40 Atl. 928.

Cook v. Hunt, 24 Ill. 536. But a witness cannot be sustained as to credibility by allowing another witness to testify to his individual opinion on such question. *Savannah, F. & W. R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400.

The testimony of witnesses living in the neighborhood of a witness whose character for truth and veracity is attempted to be impeached, that they never heard her character in that respect questioned, is competent, as well as the testimony of witnesses who state that they know her reputation and that it is good. *Stevens v. Blake*, 5 Kan. App. 124, 48 Pac. 888. And a sustaining witness is competent to testify to the character for truth and veracity of an impeached witness where he states that he has known such witness for several years, although he further states that he has never heard his character called in question or discussed. *Davis v. Franke*, 33 Gratt. 414. See also criminal cases of *State v. Nelson*, 58 Iowa, 208, 12 N. W. 253; *Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695. But an impeached witness cannot be sustained by testimony of people who are not familiar with his reputation, that they never heard it assailed. *Magee v. People*, 139 Ill. 138, 28 N. E. 1077.

In *Artope v. Goodall*, 53 Ga. 318, where the trial court had refused to permit a sustaining witness to be asked whether he would believe the impeached witness under oath where he stated that his character had been exemplary in some things and not in others, but that he did not know the general opinion of the people about him, it is said that if the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should at least be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration that from this character he would believe him under oath.

In *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748, it is held that the striking out of the testimony of a sustaining witness who on cross-examination states that he had never heard the witness's reputation discussed, nor talked with anyone about it, is error where he has testified on direct examination that he knows his reputation for truth, honesty, and integrity, and that it is good, and that he would believe him under oath.

A sustaining witness is competent to testify that he would believe the impeached witness under oath, where he states that he has been acquaint-

ed with him for ten years, is well acquainted in his neighborhood and has heard his character questioned, although he states that he does not know "from the speech of people" what his character for truth and veracity is. *Adams v. Greenwich Ins. Co.* 70 N. Y. 166. And a witness who testifies that he knows the impeached witness and the persons with whom he associates may be asked whether he would believe him under oath, although he further states that he has never heard his character for truth and veracity spoken of. *People v. Davis*, 21 Wend. 315. See also *National Bank v. Scriven*, 63 Hun, 375, 18 N. Y. Supp. 277.

▲ a sustaining witness who testifies that he has known the impeached witness fifteen years and has never heard his reputation questioned except by persons connected with him in business, cannot be asked whether he would believe him on oath, judging from his knowledge of his general reputation for truth, as there is no sufficient foundation laid by asking his knowledge of his character. *Lyman v. Philadelphia*, 56 Pa. 488. And a witness called to support the credibility of another, attacked by proof of bad character for truth and veracity, is improperly permitted to testify that he would believe the impeached witness under oath, where he qualified only by testifying that he had lived in the same neighborhood for some years and had never heard his character for truth discussed or talked about except by one person. *Sloan v. Edwards*, 61 Md. 89. So, a sustaining witness who testifies that he lives 4 or 5 miles from the impeached witness, has known him for four or five years and has never heard a word said against him as a man of truth and veracity, but who says he cannot say that he knows his character for truth and veracity among his neighbors, cannot be permitted to testify whether he would believe such witness under oath. *Clay v. Robinson*, 7 W. Va. 348. Distinguishing the criminal case of *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293, in which it was held that a person well acquainted with a witness in the community in which he lives, whose character for truth and veracity has been impeached, is a competent witness to sustain the impeached witness and rebut the evidence of bad character, although he has never heard his character in that respect called in question or spoken of.

In *Morss v. Palmer*, 15 Pa. 51, it is said that sustaining evidence where the character of a witness for truth and veracity has been attacked is not to be confined to the neighborhood where he now lives, but may be permitted as to his character at a former place of residence some years before.

In *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116, it is held that a witness called to support a witness attempted to be impeached by proof of general bad character can be questioned only as to the general good character of the impeached witness, and not as to his character as to truth and veracity, under Georgia Civ. Code, § 5293, providing that a witness may be impeached as to his general bad character, and may be sustained by similar proof of character.

IX.—OFFERS OF EVIDENCE AND OBJECTIONS.

[To sustain an exception to the rejection of evidence, counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what is intended. If he leaves the offer fairly open to two constructions, he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferable that he was so understood by the judge who rejected the evidence.]

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| 1. Necessity for an offer—to save exception to the exclusion of oral evidence. | 14. — by an offer or challenge. |
| 2. — to make matter evidence. | 15. Opening the door for one's self. |
| 3. Substance of an offer. | 16. Opening the door for the adversary—by error, against objection. |
| 4. Repeating the offer. | 17. Retracting. |
| 5. Offer in hearing of jury. | 18. The necessity for an objection. |
| 6. Offer without putting question. | 19. The substance of objection. |
| 7. Calling for disclosure—before swearing witness. | 20. Time for objecting. |
| 8. — before putting question. | 21. Right to call for ground of objection. |
| 9. Offer of document. | 22. Cross-examining as to competency. |
| 10. — of part of series or complex document. | 23. Counter proof as to competency. |
| 11. Precluding offer by admitting fact. | 24. Arguing as to admissibility. |
| 12. Necessity of promise to connect. | 25. Repeating the objection. |
| 13. Opening the door for the adversary—by error, without objection. | 26. Waiving objections. |

1. Necessity for an offer—to save exception to the exclusion of oral evidence.

One who desires to preserve the question of the admissibility of evidence which he seeks to introduce by questioning a witness must, upon objection to his question and the ruling of the court refusing to receive the testimony, offer the evidence which he desires to have admitted.¹

This rule does not prevail, however, when an offer would be useless and could merely avail for a repetition of the ruling upon objection to the question;² nor does it prevail when the question is asked under such conditions that the examiner may not be supposed to know what the witness would respond.³

¹Alabama—*Tolbert v. State*, 87 Ala. 27, 6 So. 284.

Arizona—*Snead v. Tietjen* (Ariz.) 24 Pac. 324.

California—*Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 238.

Georgia—*Windsor v. Del Bondio*, 99 Ga. 749, 27 S. E. 750.

Illinois—*Gaffield v. Scott*, 33 Ill. App. 317; *Hobbie v. Ogden*, 72 Ill. App. 242; *Chicago & E. R. Co. v. Binkopski*, 72 Ill. App. 22.

Indiana—*Mitchell v. Chambers*, 55 Ind. 289; *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664; *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

Iowa—*Paddleford v. Cook*, 74 Iowa, 433, 38 N. W. 137; *Donnelly v. Burkett*, 75 Iowa, 613, 34 N. W. 330; *Jenks v. Knott's Mexican Silver Min. Co.* 58 Iowa, 549, 12 N. W. 588.

Kansas—*State v. Barker*, 43 Kan. 262, 23 Pac. 575.

Kentucky—*Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8; *Reid v. Lilly*, 15 Ky. L. Rep. 474, 23 S. W. 955.

Maryland—There seems to be a slight variation in the rule in Maryland, where it has been held that a judgment may be reversed for refusing to permit a witness to answer a question in itself proper and pertinent, although the object for which the evidence was offered was not stated, and although it does not appear from the record what would have been the answer of the witness. *Calvert County Comrs. v. Gantt*, 78 Md. 286, 28 Atl. 101, Affirmed in 78 Md. 291, 29 Atl. 610.

Massachusetts—*Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 22 L. R. A. 695, 19 N. E. 387; *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508.

Missouri—*Best v. Hoeffner*, 39 Mo. App. 682; *Jackson v. Hardin*, 83 Mo. 175.

Nebraska—*Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438; *Yates v. Kinney*, 25 Neb. 120, 41 N. W. 128; *Burns v. Fairmont*, 28 Neb. 866, 45 N. W. 175; *Barton v. McKay*, 36 Neb. 632, 54 N. W. 968; *Davis v. Getchell*, 32 Neb. 792, 49 N. W. 776; *Morsch v. Besack*, 52 Neb. 502, 72 N. W. 953.

Nevada—*State v. Lewis*, 20 Nev. 333, 22 Pac. 241.

New York—*Re Bateman*, 145 N. Y. 623, 40 N. E. 10; *Daniels v. Patterson*, 3 N. Y. 47; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434; *Millard v. Holland Trust Co.* 90 Hun, 607, 35 N. Y. Supp. 948.

North Carolina—*Overman v. Coble*, 35 N. C. (13 Ired. L.) 1.

North Dakota—*Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Halley v. Folsom*, 1 N. D. 325, 48 N. W. 219.

Ohio—*Meeker v. Browning*, 17 Ohio C. C. 548. But see *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.

Oregon—*Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744; *Tucker v. Constable*, 16 Or. 407, 19 Pac. 13.

South Carolina—*Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591.

South Dakota—*Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43; *Hanson v. Red Rock Twp.* 7 S. D. 38, 63 N. W. 156.

Texas—*Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629.

Vermont—*Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488.

Virginia—*Martz v. Martz*, 25 Gratt. 361, 367.

Wisconsin—*Dreher v. Fitchburg*, 22 Wis. 675, 90 Am. Dec. 91; *John R. Davis Lumber Co. v. First Nat. Bank*, 90 Wis. 464, 63 N. W. 1018.

United States—*Ladd v. Missouri Coal & Min. Co.* 32 U. S. App. 93, 66 Fed. Rep. 880, 14 C. C. A. 246.

It is sometimes said, however, that the offer must be made at such time that the court will have the benefit of it in knowing what testimony is sought to be elicited, before ruling on the objections to the question, and if not made until after the objection has been sustained an exception taken would come too late. *Chicago & I. Coal R. Co. v. DeBaum*, 2 Ind. App. 281, 28 N. E. 447; *Young v. Otto*, 57 Minn. 307, 59 N. W. 199. See *Watkins v. Edgar*, 77 Mo. App. 148; where the court refused to permit counsel to state the substance of the evidence which he expected to adduce in answer to a question objected to by opposing counsel.

However, if the question concern the competency of the witness, and not the substance of his testimony, it is unnecessary that there should be a statement of what it is proposed to prove by him, when this is unnecessary to enable the trial court to pass upon the question of his competency. *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N. E. 35; *Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132.

**Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Starr v. Hunt*, 25 Ind. 313; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434.

**Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629; *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

2. — to make matter evidence.

In addition to the question of the necessity of an order in order to present an error of the trial court in excluding oral evidence, for consideration by the appellate tribunal, is the problem concerning the necessity of a formal offer of specific evidence for the purpose of entitling it to consideration by the jury.

Although a formal offer of documentary evidence is undoubtedly preferable it is by no means a necessity, for if matter which is before the court is treated by the parties as evidence it may be so considered, although not formally offered.¹

¹*O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269; *McChesney v. Chicago*, 152 Ill. 543, 38 N. E. 767; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Charles v. Patch*, 87 Mo. 450; *Zieverink v. Kemper*, 50 Ohio St. 208, 34

N. E. 250; *Bevington v. State*, 2 Ohio St. 161. In *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336, where the court ordered that the witness who had produced documents leave them in the custody of the court until the conclusion of the case, thereupon to be returned to the witness at his office, and the parties examined and cross-examined the witness concerning the documents, as both the court and counsel understood that the documents were in evidence it was said they should be so considered.

A like rule applies in election controversies, to boxes and ballots contained therein. *Convery v. Conger*, 53 N. J. L. 468, 22 Atl. 43, 459; *Re White's Contested Election*, 4 Pa. Dist. R. 363.

But the mere marking of a document as an exhibit by the stenographer does not make the document evidence. *Casteel v. Millison*, 41 Ill. App. 61.

3. Substance of an offer.

The offer of testimony should be clear¹ and without vagueness or uncertainty, should separate matter which it is proper for the jury to consider from that which it is improper for them to regard,² state only the former so fully that its propriety is apparent,³ and specifically point out⁴ the evidence sought to be introduced. The offer must be confined to a statement of the answer which it is expected the same witness will make to the question objected to,⁵ must correspond to the question,⁶ and, although it may be explained, may not be enlarged by a statement of its purpose.⁷

¹*Pendleton v. Smissaert*, 1 Colo. App. 508, 29 Pac. 521; *Lincoln Nat. Bank v. Davis*, 32 Neb. 1, 48 N. W. 892.

An offer "to prove that he was told previously to his removal that they would take the property and that he might leave it" by a lessee, was held "too vague" in an action to recover rent after the abandonment of the leased premises. *Reeves v. McComeskey*, 168 Pa. 571, 32 Atl. 96.

²*Herndon v. Black*, 97 Ga. 327, 22 S. E. 924; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565; *Wamsley v. Darragh*, 14 Misc. 566, 35 N. Y. Supp. 1075; *Mundis v. Emtg*, 171 Pa. 417, 32 Atl. 1135; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96. In *Cincinnati, I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171, an offer to prove both competent and incompetent evidence blended together and offered as a whole was insufficient, and the objection was properly sustained.

And so, in a suit brought by the assignees of a bank to collect an unpaid subscription to the capital stock, an offer to prove an assessment or order made by a judge at chambers during vacation authorizing the assignees to collect the unpaid subscription, accompanied by an offer to prove a petition and citation which were not pertinent to the issue, was held properly to have been rejected, in *Citizens & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73.

Likewise in *Reynolds v. Franklin*, 47 Minn. 145, 49 N. W. 648, wherein the value of land was in question, an offer to prove what defendant had authorized a certain real estate broker to sell the land for, that the broker advertised and offered it for sale at that price without finding a purchaser, and that one person in particular to whom it was offered at that price examined and refused it, was properly rejected, as the fact that a certain person had refused it was inadmissible.

So in *Clark v. Ryan*, 95 Ala. 406, 11 So. 22, in a suit to recover for breach of a contract of hire, because of the discharge of plaintiff, an offer to prove that he was given to the excessive use of intoxicating liquors and had been indicted for drunkenness was properly rejected, as evidence that he had been indicted for drunkenness was not legal evidence.

The same rule applies to offers of documentary evidence, and an offer of documentary evidence, portions of which are improper, should point out those portions which are proper, offering only the latter. *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388; *McGrew v. Missouri P. R. Co.* 109 Mo. 582, 19 S. W. 53; See also *infra*, § 9.

**Russell v. Stoner*, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; *Best v. Hoeffner*, 39 Mo. App. 682; *Pryor v. Morgan*, 170 Pa. 568, 33 Atl. 98; *Ladd v. Missouri Coal & Min. Co.* 32 U. S. App. 93, 66 Fed. Rep. 880, 14 C. C. A. 246; *Jackson v. Kansas City Pkg. Co.* 42 Minn. 382, 44 N. W. 126; *Middleton v. Griffith*, 57 N. J. L. 442, 31 Atl. 405.

In harmony with this rule it is held that the offer must be complete in itself and must not omit facts without which the facts offered are irrelevant. *Chamberlin v. Vance*, 51 Cal. 75.

In *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528, the court declared the rule to be that an offer of evidence must be so full that the court can see from it, in connection with the evidence already in, that something material to the issue will be disclosed by the evidence offered.

**Warrior Coal & C. Co. v. Mabel Min. Co.* 112 Ala. 624, 20 So. 918; *Stevens v. San Francisco & N. P. R. Co.* 100 Cal. 554, 35 Pac. 165.

The evidence must be admissible for the specific purpose for which it is offered. *Maxwell Land Grant Co. v. Dawson*, 7 N. M. 133, 34 Pac. 191.

A general offer that in certain proceedings the plaintiff swore to statements which were false, without any specification of any particular statement that was alleged to be false, is not sufficiently specific. *Cole v. High*, 173 Pa. 590, 34 Atl. 292.

In *Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531, it was held that the offer must be specific and that a general offer would not be sufficient; that an offer to prove the amount of rent received, the amount paid for improvements, and what the annual rental value after deducting the cost of improvements was, as it did not state specifically the amount of the rent or the cost or value of the improvements proposed to be proved, was too general.

In consonance with the rule it was held in *Murphy v. Jones* (Pa.) 5 Cent. Rep. 480, 16 Atl. 726, that an offer to show payment should set forth the

facts specifically as to the mode or manner in which the payment was made or under what particular state of facts the defendant is not indebted.

In *Davis v. Harper*, 17 Tex. Civ. App. 88, 42 S. W. 798, which was a suit to recover an office, an offer in evidence of the numbers of the tickets and poll lists for the identification of the voters was properly rejected, for, although illegal votes might have been cast as alleged, they should have been named in the offer and the evidence confined to them.

In *Alexander v. Thompson*, 42 Minn. 498, 44 N. W. 534, it was held that an offer in general terms to prove the allegation of the answer should properly have specified the particular facts proposed to be proved.

**Harter v. Eltzroth*, 111 Ind. 159, 13 N. E. 129.

**Masons' Union L. Ins. Asso. v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897.

The offer cannot supply omissions in the question. *Cutting v. Baker*, 43 Neb. 470, 61 N. W. 726.

**Mentel v. Hippely*, 165 Pa. 558, 30 Atl. 1021.

4. Repeating the offer.

When an offer of evidence has been rejected, if subsequently the reasons for its rejection are removed,¹ or if it is desired to introduce the evidence for another purpose,² the offer should be repeated, but if its repetition could only result in the repetition or reversal of the ruling upon the first offer,³ it need not be renewed.

**Jones v. St. Louis, I. M. & S. R. Co.* 53 Ark. 27, 13 S. W. 416.

**Patterson v. Chicago, M. & St. P. R. Co.* 70 Iowa, 593, 33 N. W. 228.

*Having once obtained a ruling and saved an exception counsel is not bound to press the question further. *Mackin v. Blythe*, 35 Ill. App. 216.

Thus, it was held in *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670, where evidence was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for another purpose, that plaintiff was not bound to again tender the evidence.

When the court reserves its ruling upon the admissibility of evidence, a subsequent offer should be made or the attention of the court in some way called to the matter, and unless this is done the ruling may not be treated as an exclusion of the evidence. *Dudley v. Poland Paper Co.* 90 Me. 257, 38 Atl. 157.

5. Offer in hearing of jury.

If offered evidence be oral the offer is necessarily oral, and may be made notwithstanding the presence and hearing of the jury.¹

If it be documentary the judge may require that the document be submitted to him to determine its admissibility before allowing it to be read in the presence of the jury, against objection.²

¹*Carroll County Comrs. v. O'Conner*, 137 Ind. 622, 35 N. E. 1006; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287.

But reiterated offers in their hearing, after exclusion, should not be tolerated. *Scripps v. Reilly*, 38 Mich. 10, 24 Am. Rep. 575; *Turner v. Muskegon Mach. & Foundry Co.* 97 Mich. 166, 56 N. W. 356.

The court may require the offer to be reduced to writing, or made in such manner that it will not be heard by the jury. *Omaha Coal, Coke, & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. 211.

It should be borne in mind, as is stated in § 1, *supra*, that there must be an offer of proof after objection to a question; and the presence of the jury does not affect counsel's right or duty to make that offer, although the court may require the offer, as stated in the text, to be made in such manner as not to reach the jury. *Carroll County Comrs. v. O'Conner*, 137 Ind. 622, 35 N. E. 1006.

²*Gould v. Weed*, 12 Wend. 12, 24; *Scripps v. Reilly*, 38 Mich. 10, 24 Am. Rep. 575; *Keedy v. Newcomer*, 1 Md. 241.

The judge should not permit reading to him as an indirect way of letting the jury hear. *Philpot v. Taylor*, 75 Ill. 309, 312. Reading in the hearing of the jury was held not error in *Brill v. Flagler*, 23 Wend. 354.

A judgment will be reversed because of the persistent efforts of the counsel to place the contents of a letter before the jury after it has been excluded, unless it can be shown that the letter is legally admissible. *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438.

6. Offer without putting question.

An offer of oral evidence may be refused if the witness is not present in court¹ and circumstances indicate that the offer is not made in good faith.² The court may not be required to act upon mere offers³ when the witnesses are not questioned.

¹*Lewis v. Newton*, 93 Wis. 405, 67 N. W. 724; *Robinson v. State*, 1 Lea, 673; *Eschbach v. Hurtt*, 47 Md. 61, 66. See also *Lisonbee v. Monroe Irrigation Co.* 18 Utah, 313, 54 Pac. 1009, holding that offers are properly rejected when counsel refused to produce the witness upon the court's requesting him to do so, that it might rule on the questions and answers.

In *Biddick v. Kobler*, 110 Cal. 191, 42 Pac. 578, where there was a general offer to prove without producing the witnesses, it was said that, unless an objection be made upon the ground that the offer is an improper method, it may be assumed that the method used was by consent of parties.

Although the appellate court will not, as a general rule, review exceptions taken to mere offers, nevertheless, if it appears that the offers were made in absolute good faith, for the purpose of furthering the business of the court, with its sanction and without objection by opposing counsel, the rule will be departed from. *Gerard v. Cowperthwait*, 2 Misc. 371, 21 N. Y. Supp. 1092.

**Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692, 5 Sup. Ct. Rep. 93.

**Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020; *Ralston v. Moore*, 105 Ind. 243, 4 N. E. 673; *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096; *Stevens v. Newman*, 68 Ill. App. 549; *Higham v. Vanosdol*, 101 Ind. 160.

7. Calling for disclosure—before swearing witness.

The court may, as a condition of allowing a witness to be sworn or examined, require counsel, if able to do so, to state the substance of what he proposes to prove by him.¹

If no request or disclosure be made, it is error to refuse to allow a witness to be sworn, if he is competent to testify to anything, although he may be incompetent as to other things.²

¹*Roy v. Targee*, 7 Wend. 359.

But the court should always listen to reasons offered for not making such disclosure. *Roy v. Targee*, 7 Wend. 359.

**Beal v. Finch*, 11 N. Y. 128, 135; *Brown v. Richardson*, 20 N. Y. 472.

It was expressly held in *Haussknecht v. Claypool*, 1 Black, 431, 17 L. ed. 172, that it is not essential to state that the witness is a material witness, though to do so is more in conformity with the usual practice. See 1 Black, 435, 17 L. ed. 173, where judgment was reversed for error in exclusion. *Contra, Stewart v. Kirk*, 69 Ill. 509.

8. — before putting question.

If a question calls for evidence which may or may not be relevant or material, the adverse party may require that counsel state the substance of what he proposes to prove,¹ and if he refuse to do so the question may be excluded.²

But this rule does not apply to strict cross-examination.³

¹*First Baptist Church v. Brooklyn F. Ins. Co.* 23 How. Pr. 448, 450, Affirmed on the merits, 28 N. Y. 153; *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204; *Fairchild v. Case*, 24 Wend. 381; *Morgan v. Browne*, 71 Pa. 130, 136.

*Same cases.

**O'Donnell v. Segar*, 25 Mich. 367, 372; *Martin v. Elden*, 32 Ohio St. 282; *Batten v. State*, 80 Ind. 394; *Stanton County v. Canfield*, 10 Neb. 389, 6 N. W. 466. *Contra, United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204 (Story, J.).

9. Offer of document.

Under a general offer of a document and its reception in evidence without objection or qualification, the whole document is deemed in evidence for all purposes¹, and including indorsements thereon, such as may be deemed connected with the contents.²

It is unnecessary that the whole of a document shall be introduced in evidence when it is desired to use portions of it, unless the parts are so interdependent that the whole document must necessarily be considered in the consideration of the part.³ But if a part of a document be read in evidence by one party, it is the privilege of the adverse party to read the remainder of the same document.⁴

Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470, Affirming 10 Hun, 372. Hence the party who so introduced it cannot impeach any part of it. *Maclin v. New England Mut. L. Ins. Co.* 33 La. Ann. 801; *Hewett v. Buck*, 17 Me. 147, 35 Am. Dec. 243.

If it is desired to withhold a part of a document it is necessary to point out definitely the part offered, that is, the pages, paragraphs, sentences, or words. *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764.

Bell v. Keefe, 12 La. Ann. 340.

Travis v. Continental Ins. Co. 32 Mo. App. 198; *Pacific Teleg. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057; *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33; *Anderson v. Anderson*, 13 Tex. Civ. App. 527, 36 S. W. 816.

But see *Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 52 N. Y. Supp. 759, where, in an action against an insurance company, a portion of the paper which was called the application had been torn from the residue, it was held that the mutilated paper was properly rejected; and *First Nat. Bank v. Taliaferro*, 72 Md. 164, 19 Atl. 364, where it is said that an offer to prove only the printed part of a contract implies that there is some other part in writing, and is an offer to prove part of an entire contract which, if admissible at all, is only admissible in its entirety.

Imperial Hotel Co. v. H. B. Claflin Co. 55 Ill App. 337; *Re Chamberlain*. 64 Hun, 637, 19 N. Y. Supp. 1010; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507; *Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486; *Haddaway v. Post*, 35 Mo. App. 278; *Re Chamberlain*, 140 N. Y. 390, 35 N. E. 602.

Defendant should be permitted to read the whole of depositions of his witnesses, which were used by plaintiff in the cross-examination of those witnesses, for the purpose of calling their attention to statements made by them contained therein, although no part of the depositions was read to the jury by plaintiff's counsel. *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514.

10. — of part of series or complex document.

Under an offer of a particular document forming an integral part of a complex document, produced entire, and its reception without objection or qualification,—such as an offer and reception of a notary's protest without mentioning a certificate of notice attached thereto, or an offer and reception of a pleading contained in a judgment roll, produced without mentioning the judgment, etc.,—the particular docu-

ment offered is alone deemed in evidence for the party offering it,¹ subject, however, to the right of the adverse party to read the other connected papers (but so far only as they qualify the paper offered),² if their genuineness appears, or if it was assumed by the offer.

But it is unnecessary that the residue of a set of documents or of a complex document be read in evidence because it is desired to have a portion of the set or document admitted when the whole is not necessary to a correct understanding of the part.³

¹*Marchand v. Coffee*, 23 La. Ann. 442. See *Laurent v. Lanning*, 32 Or. 11, 51 Pac. 80; where it was held that the offer of a mortgage carried the notary's certificate into evidence.

²*Abbott v. Pearson*, 130 Mass. 191.

If one party introduces letters constituting part of a correspondence between himself and the other party, the adverse party is entitled to introduce the remainder of the correspondence (*Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614; *Lindheim v. Days*, 11 Misc. 16, 31 N. Y. Supp. 870; *Lewis v. Newcombe*, 1 App. Div. 59, 37 N. Y. Supp. 8), although the correspondence is incompetent (*Werner v. Kasten* (Tex. Civ. App.) 26 S. W. 322), even if the letter first introduced in evidence be subsequent to that sought to be introduced by the adverse party when the letter first introduced in evidence contains references to the one first written. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593.

For other illustrations of the rule stated in the text, see *Moniotte v. Lieux*, 41 La. Ann. 528, 6 So. 817; *Silverman v. Empire L. Ins. Co.* 24 Misc. 399, 53 N. Y. Supp. 407; *Wallace Bros. v. Douglas*, 114 N. C. 450, 19 S. E. 668.

But when the documents are not necessarily connected, as where proceedings set forth in different records are not part of the same transaction (*Threadgill v. Anson County*, 116 N. C. 616, 21 S. E. 425), the other parts of the series of documents, if otherwise immaterial, may not properly be admitted. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

³*Tustin Fruit Asso. v. Earl Fruit Co.* (Cal.) 53 Pac. 693; *Dougherty v. Metropolitan L. Ins. Co.* 3 App. Div. 313, 38 N. Y. Supp. 258; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905; *Powers v. Standard Oil Co.* 53 S. C. 358, 31 S. E. 276; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027; *Priest v. Glenn*, 4 U. S. App. 478, 51 Fed. Rep. 400, 2 C. C. A. 305; *O'Hara v. Mobile & O. R. Co.* 40 U. S. App. 471, 76 Fed. Rep. 718, 22 C. C. A. 512.

If a party has introduced part of a correspondence by one of the defendants, he may, on cross-examination, properly identify the balance and offer it in evidence in connection with the cross-examination. *Thayer v. Hoffman*, 53 Kan. 723, 37 Pac. 125.

If another part is necessary to show the relation of the admitted part to other portions of the evidence, the offer should include it. *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307.

In some of the states this matter is perhaps regulated by statute. See *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 1, 41 Atl. 467.

11. Precluding offer by admitting fact.

Upon a conclusive admission of fact being made by counsel, the court may in its discretion exclude an offer of further evidence of the fact admitted,¹ unless the offer goes beyond the admission.²

But this does not extend to shutting off strict cross-examination.³

¹*Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Bannister v. Alderman*, 111 Mass. 261 (holding it no error to rule either way); *Ainsworth v. Hutchins*, 52 Vt. 554; *Butterworth v. Pecare*, 8 Bosw. 671; *Donnelly v. Burkett*, 75 Iowa, 613, 34 N. W. 330; *Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242; *Blackburn v. St. Paul F. & M. Ins. Co.* 117 N. C. 531, 23 S. E. 456; *Whiteside v. Lowney*, 171 Mass. 431, 50 N. E. 931.

The reason is the court is not bound to spend time in taking evidence and ruling on a point which is not controverted. But the power to refuse should be sparingly used. It is not error to admit the evidence. *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41.

"It would be absurd to hold that any party, by his bald admissions on a trial, could shut out legal evidence." *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558.

²As, for instance, where the offer is to show circumstances, manner, etc., as being relevant in aggravation. See also *Priest v. Groton*, 103 Mass. 540.

That a party is not bound to take a disclaimer of damages as reason for excluding evidence, see *Brown v. Perkins*, 1 Allen, 89, 96.

³*Berger v. Clippert*, 53 Mich. 468, 19 N. W. 149.

12. Necessity of promise to connect.

He who offers evidence, the competency of which depends upon other evidence being given to establish it, must make it appear that it will be competent by stating what he expects to prove, and if he does not do so when objection is made, it is not error to exclude the evidence.¹

¹*Mechelke v. Bramer*, 59 Wis. 57, 17 N. W. 682; *Piper v. White*, 56 Pa. 90; *Hall v. Patterson*, 51 Pa. 289; *Bilberry v. Mobley*, 21 Atl. 277; *Van Buren v. Wells*, 19 Wend. 203; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491, and cases cited; *Carnes v. Platt*, 15 Abb. Pr. N. S. 337, 4 Jones, & S. 361, Affirmed in 59 N. Y. 405; *Boland v. Louisville & N. R. Co.* 106 Ala. 641, 18 So. 99; *Holman v. Boston Land & Secur. Co.* 8 Colo. App. 282, 45 Pac. 519; *McAllister v. Barnes*, 35 Mo. App. 668.

13. Opening the door for the adversary—by error, without objection.

Where irrelevant evidence has been received without objection it

is not error to allow the adverse party to give evidence to meet it.¹ So, if one party introduced evidence upon a point immaterial as matter of law, but not objected to as immaterial, the other side may be allowed to rebut it.²

Yet, on the other hand, it is not error to refuse to receive equally irrelevant evidence to meet it,³ except where the evidence received gave a right to contradict for purpose of impeachment, or was calculated to make an impression on the jury which instructions from the court could not efface,⁴ and which the offered evidence tends to remove.

¹*Blossom v. Barrett*, 37 N. Y. 434, 438, 97 Am. Dec. 747; *Havis v. Taylor*, 13 Ala. 324; *Hale v. Philbrick*, 47 Iowa, 217; *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169; *Cleveland, C. C. & St. L. R. Co. v. Highsmith*, 59 Ill. App. 651; *Hobbs v. Tipton County Comrs.* 116 Ind. 376, 19 N. E. 186; *Swofford Bros. Dry-Goods Co. v. Zeigler*, 2 Kan. App. 296, 42 Pac. 592; *Arbuckle v. Smith*, 74 Mich. 568, 42 N. W. 124; *Ellis v. Simpkins*, 81 Mich. 1, 45 N. W. 646; *Wilson v. Gibson*, 63 Mo. App. 656; *Bethany Sav. Bank v. Cushman*, 66 Mo. App. 102; *Drucker v. Metropolitan Elev. R. Co.* 73 Hun, 102, 25 N. Y. Supp. 922; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721; *Ward v. Blake Mfg. Co.* 12 U. S. App. 295, 56 Fed. Rep. 437, 5 C. C. A. 538.

But the practice disapproved and held not error to exclude such evidence. *Walkup v. Pratt*, 5 Harr. & J. 51.

The giving of an incompetent kind of evidence—such as oral to vary written—is a waiver of the right to object to the adversary's doing likewise. *Shaw v. Stone*, 1 Cush. 228, 243.

But in *Lake Roland Elev. R. Co. v. Weir*, 86 Md. 273, 37 Atl. 714, a distinction is made between cases where the first improper evidence was objected to and where it was not, and it is insisted that incompetent evidence may only be contradicted when its introduction was objected to. To the same effect see *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321. The introduction of improper evidence does not authorize the like in contradiction of it. *Carr v. West End Street R. Co.* 163 Mass. 360, 40 N. E. 185; *Stinde v. Blesch*, 42 Mo. App. 578; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547. But it is also said that the introduction of improper evidence on one side does not justify the same course by the adverse party, since it is not required to change the rules of evidence, that errors may be balanced. *Redman v. Peirsol*, 39 Mo. App. 173; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; *Dodge v. Kiene*, 28 Neb. 216, 44 N. W. 191.

²*Waldron v. Romaine*, 22 N. Y. 368, 371; *Furbush v. Goodwin*, 25 N. H. 425; *Weiting v. Shearer*, 8 N. Y. Week. Dig. 392; *Findlay v. Pruitt*, 9 Port (Ala.) 195; *Patton v. Philadelphia & New Orleans*, 1 La. Ann. 98, s. p., recognized in *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

So, if a party, while testifying in his own behalf, volunteers an irrelevant statement, no question on the point being asked, it is not error to re-

ceive contrary evidence from the other party. *Brown v. Perkins*, 1 Allen, 89, 96.

"The defendant opened the door for the testimony and cannot complain that it was not closed soon enough to suit him." *Sherwood v. Titman*, 55 Pa. 77; Contra, *Mitchell v. Sellman*, 5 Md. 376.

This is not error, even though allowed as independent testimony, not merely by way of contradiction. *Sherwood v. Titman*, 55 Pa. 77. Contra, *McCarthy v. Territory*, 1 Neb. 121.

³*Farmers' & Mfrs. Bank v. Whinfield*, 24 Wend. 419; *Stringer v. Young*, 3 Pet. 320, 337, 7 L. ed. 693, 698; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535; *Manning v. Burlington, C. R. & N. R. Co.* 54 Iowa, 240, 20 N. W. 169. Contra, *Thomson v. Brothers*, 5 La. 279.

A party has not the right to give immaterial evidence because his adversary has done so before him. *People v. Dowling*, 84 N. Y. 478, 486, (Per Folger, Ch. J.).

⁴*Wallis v. Randall*, 81 N. Y. 164, 167, Affirming 16 Hun, 33. And see *Stringer v. Young*, 3 Pet. 320, 337, 7 L. ed. 693, 698; *Scales v. Shackelford*, 64 Ga. 170.

14. — by an offer or challenge.

An offer to allow the other party to prove that which might be objected to under the pleadings,¹ or a challenge to him to do so,² followed by a responsive offer of such proof, is a waiver of the right to object.

¹*Adams v. Farnsworth*, 15 Gray, 423, 426.

²*Rundell v. Butler*, 10 Wend. 119.

15. Opening the door for one's self.

A party who puts in illegal evidence not objected to by the other party cannot complain that he is not allowed to follow it with other such evidence,¹ even to confirm² or explain it.³

¹*Lyons v. Teal*, 28 La. Ann. 592.

²*Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576, 579.

³*Brand v. Longstreet*, 4 N. J. L. 325.

16. Opening the door for the adversary—by error, against objection.

Where improper evidence has been received against objection and exception, the refusal to receive contrary evidence on the same point is error which will not be disregarded by the appellate court, unless they can see that the improper evidence could not have influenced the jury.¹

¹*Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241; *Vermont Farm Mach. Co. v. Batchelder*, 68 Vt. 430, 35 Atl. 378; *Spaulding v. Chicago, St. P. & K.*

C. R. Co. 98 Iowa, 205, 67 N. W. 227; *Ward v. Washington Ins. Co.* 6 Bosw. 229.

An unequal application of the rules of evidence which might have prejudiced the case, such as allowing opinion evidence offered by one party and excluding evidence of the same character on the same point offered by the other, is ground of reversal. *Holten v. Holten*, 5 N. Y. Week. Dig. 14.

17. Retracting.

If a party, after causing a witness to be sworn, or a deposition to be taken, refuses to examine the witness or read the deposition, the other party has the right to do so, but the evidence which the latter adduces by so doing will be his own, within the rule forbidding him to impeach it.¹

One who has put a question has the right to withdraw it before any answer is given.

¹*Sullivan v. Norris*, 8 Bush, 519; *Weil v. Silverstone*, 6 Bush, 698; *Musick v. Ray*, 3 Met. (Ky.) 427 (where a party refused to read his own cross-examination in a deposition, and the court, after allowing the adverse party to read it, allowed him also to contradict it; and this was held error).

18. The necessity for an objection.

It is a general rule that in order to avail the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court.¹

The reason for this rule seems to be that the objection may be obviated if assigned at the trial² and many of the exceptions are instances of objections which could not be obviated.³ An exception is also made where the representative of an infant⁴ or insane party⁵ has failed to make proper objection. The court should nevertheless exclude the improper evidence, and an objection is not prerequisite to an assignment of its admission as error.

¹The rule applies to the admission of parol or other secondary evidence of the contents of written instruments (*Cleveland, C. C. & St. L. R. Co. v. Strong*, 56 Ill. App. 604; *Riehl v. Evansville Foundry Asso.* 104 Ind. 70, 3 N. E. 633; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151; *Scott v. Chicago, M. & St. P. R. Co.* 78 Iowa, 199, 42 N. W. 645; *Paine v. Track*, 5 U. S. App. 283, 56 Fed. Rep. 233, 5 C. C. A. 497; *Brown v. Oldham*, 123 Mo. 621, 27 S. W. 409; *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018; *McLaughlin v. Wheeler*, 1 S. Dak. 497, 47 N. W. 816), to the introduction of evidence which is not the best evidence (*Western U. Teleg. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *Western U. Teleg. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564), to the admission of parol evidence to vary written (*Schwersenski v. Vineberg*, 19 Can. S. C. 243), to the admission of a document in some particular imperfect (*Billings v. Chicago*, 167

Ill. 337, 47 N. E. 731; *Wells, F. & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42), as a deed, the certificate to the acknowledgment of which is defective (*Western v. Flanagan*, 120 Mo. 61, 25 S. W. 531), to the admission of a note without proving the signatures of the maker and indorser (*Knoll v. Kiessling*, 23 Or. 8, 35 Pac. 248), to the introduction of a deposition without showing a right under the statute to read it, on account of the absence of the witness (*Bell v. Jamison*, 102 Mo. 71, 14 S. W. 714), to the admission of parol evidence of that which the statute requires shall be written (*Leeper v. Paschal*, 70 Mo. App. 117; *Yeoman v. Mueller*, 33 Mo. App. 343; *Brown v. Barnwell Mfg. Co.* 46 S. C. 415, 24 S. E. 191), to the admission of the testimony of an incompetent witness (*Doty v. Doty*, 159 Ill. 46, 42 N. E. 174; *Hickman v. Green* (Mo.) 22 S. W. 455; *Parrish v. McNeal*, 36 Neb. 727, 55 N. W. 222), to the means by which a witness refreshes his memory (*Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444), to the objection that the evidence is inadmissible under the pleadings, either as a variance therefrom (*Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.* 121 Cal. 167, 53 Pac. 565), or without the issues made thereby (*Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; *Evans & H. Fire Brick Co. v. Hadfield*, 93 Wis. 665, 68 N. W. 468; *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 18 U. S. App. 349, 57 Fed. Rep. 980, 6 C. C. A. 661; *Blanchard v. Cooke*, 147 Mass. 215, 17 N. E. 313; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907).

In some of the states there are statutes providing the method for taking advantage of a variance between the pleadings and proof. *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *Lalor v. Byrne*, 51 Mo. App. 578.

**Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Hyde v. Heath*, 75 Ill. 381.

*When the evidence is made incompetent by statute. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Houghton v. Jones*, 1 Wall. 702, 17 L. ed. 503; *Mott v. Smith*, 16 Cal. 533. But see *Howard v. Metcalf* (Tex. Civ. App.) 26 S. W. 449.

**Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930; *Cartwright v. Wise*, 14 Ill. 417; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320.

**Huling v. Huling*, 32 Ill. App. 519.

19. The substance of objection.

An objection to admission of evidence must specify the particular evidence which it is desired to exclude¹ and a general objection² or one which does not specify the ground thereof nor point out the particular evidence which it is desired to have excluded³ will not entitle the party to the exclusion of any evidence.

A similar rule prevails when there is more than one party plaintiff or defendant, and a general objection by one of the coparties to evi-

ence admissible against his coplaintiff or defendant is properly overruled, although the evidence was inadmissible as to him.⁴ A ground of objection which is not urged in the trial court may not be insisted upon in the appellate tribunal, nor will a general objection urged below⁵ entitle the objector to specify the ground for the purpose of correcting the trial court of error on appeal; neither may a new ground of objection be substituted upon the trial of the appeal for that which was urged in the lower court.⁶

An exception to the rule requiring the objection to point out the evidence objected to and state the ground of objection is made when the evidence is clearly inadmissible for any purpose, and the defect could not be obviated were the ground of objection specified.⁷

The reason for these rules requiring a party objecting to the admission of evidence to clearly define the boundaries and state the foundation of his objection seems to be that thereby the party offering the evidence will have such knowledge of its objectionable features as will enable him to remedy the defects and that also in the same manner the court will be enabled to see those defects without being put to the inconvenience of searching for them. *Rush v. French*, 1 Ariz. 99, loc. cit. 123, 25 Pac. 816; *Sigafus v. Porter*, 51 U. S. App. 693, 84 Fed. Rep. 430, 28 C. C. A. 443; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Pitts Agricultural Works v. Young*, 6 S. D. 557, 62 N. W. 432; *King v. Nichols & S. Co.* 53 Minn. 453, 55 N. W. 604; *Chicago, P. & St. L. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13; *Drew v. Drum*, 44 Mo. App. 25; *Clark v. Conway*, 23 Mo. 438; *Earl v. Lefler*, 46 Hun, 9.

⁴When part of the evidence is admissible and part is inadmissible, a general objection will entitle the objector to the exclusion of none of the evidence. *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694; *Mock v. Muncie*, 9 Ind. App. 536, 37 N. E. 281; *McGuffey v. McClain*, 130 Ind. 327, 30 N. E. 296; *Milligan v. Sligh Furniture Co.* 111 Mich. 629, 70 N. W. 133.

⁵The stock objection of "incompetent, irrelevant, and immaterial" avails nothing if the evidence be admissible for any purpose. *Wilson v. Reeves*, 70 Mo. App. 30; *Three States Lumber Co. v. Rogers*, 145 Mo. 445, 46 S. W. 1079; *Stringer v. Frost*, 116 Ind. 477, 2 L. R. A. 614, 19 N. E. 331; *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Clark Civil Twp. v. Brookshire*, 114 Ind. 437, 16 N. E. 132. But see *First Nat. Bank v. Carson*, 30 Neb. 104, 46 N. W. 276, where the objection was held sufficient as to evidence which did not in any manner tend to throw light on the issue.

⁶*Merkle v. Bennington Twp.* 68 Mich. 133, 35 N. W. 846; *Johnson v. Okers-trom*, 70 Minn. 303, 73 N. W. 147; *Steele v. Pacific Coast R. Co.* 74 Cal. 323, 15 Pac. 851; *L'Hommedieu v. Cincinnati, W. & M. R. Co.* 120 Ind. 435, 22 N. E. 125; *Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Mason v. Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 895; *Maddox v. Teague*, 18 Mont. 512, 46 Pac. 535; *Smith v. Hanie*, 74 Ga. 324.

The objection must cover all of the reasons for excluding the evidence since it is the rule that an objection which specifies particular grounds will be dealt with upon those grounds alone, and the objector will be held to have waived the grounds of objection which are not stated. *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *Alabama G. S. R. Co. v. Bailey*, 112 Ala. 167, 20 So. 313; *Kahn v. Lucchesi*, 65 Ark. 371, 46 S. W. 729; *Sullivan v. Richardson*, 33 Fla. 1, 14 So. 692; *Alexander v. Thompson*, 42 Minn. 498, 44 N. W. 534; *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L. R. A. 653, 54 N. W. 596.

**Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791.

*Under this rule when a general objection was taken at the trial the party objecting was not permitted upon appeal to insist that the evidence varied from the pleadings (*State ex rel. El Paso v. Pierce County Supers.* 71 Wis. 327, 37 N. W. 233; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Keigher v. St. Paul*, 73 Minn. 21, 75 N. W. 732; *White v. Craft* 91 Ala. 139, 8 So. 420; *Merrick v. Hill*, 77 Hun. 30, 28 N. Y. Supp. 237; *Burlington Ins. Co. v. Miller*, 19 U. S. App. 588, 60 Fed. Rep. 254, 8 C. C. A. 612); that parol evidence was admitted to vary the terms of a subsequent written contract (*John Hutchison Mfg. Co. v. Pinch*, 10 Mich. 15, 64 N. W. 729, 66 N. W. 340); that secondary evidence was admitted without a proper foundation having been laid therefor (*Kenosh Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933); that evidence which was not the best evidence was permitted to be given (*Walser v. Wear* 141 Mo. 443, 42 S. W. 928; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; *Rich v. Trustees of Schools*, 158 Ill. 242, 41 N. E. 924); that evidence involving a transaction with a decedent was given by his heir at law (*Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114); or that a municipal ordinance admitted had not been published as required by the charter. *Klotz v. Winona & St. P. R. Co.* 68 Minn. 341, 71 N. W. 257; *Chicago & E. I. R. Co. v. People*, 120 Ill. 667, 12 N. E. 207.

**Wiley v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Bright v. Ecker*, 9 S. D. 449, 69 N. W. 824. But see *Presnell v. Garrison*, 121 N. C. 366, 28 S. E. 409, where it is said that parol evidence offered to prove a fact which it is unlawful to prove by parol should not be allowed, although the objection was put on improper grounds.

**Espalla v. Richard*, 94 Ala. 159, 10 So. 137; *Lowenstein v. McCadden*, 9 Tenn. 614, 22 S. W. 426; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Waller v. Leonard* 89 Tex. 507, 35 S. W. 1045; *Tozer v. New York C. & H. R. R. Co.* 105 N. Y. 659, 11 N. E. 846; *Snowden v. Pleasant Valley Coal Co.* 16 Utah, 366, 52 Pac. 599.

20. Time for objecting.

The proper time to object to the introduction of evidence is when it becomes apparent that error will be committed by receiving evidence which is not admissible, as when the evidence is offered¹ or when a question is asked² which is in itself improper or calls for an improper answer.

Crump v. Starke, 23 Ark. 131; *Shain v. Sullivan*, 106 Cal. 208, 39 Pac. 606; *McKay v. Lane*, 5 Fla. 268; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Crabs v. Mickle*, 5 Ind. 145; *Thomson v. Wilson*, 26 Iowa, 120; *Johnson v. Mathews*, 5 Kan. 118; *Perrott v. Shearer*, 17 Mich. 48, *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528; *Skinner v. Collier*, 4 How. (Miss.) 396; *Sharon v. Minnock*, 6 Nev. 377.

It has been held, however, that incompetent testimony may be objected to at any time (*Day v. Crawford*, 13 Ga. 508), that objection to the competency of a witness is not necessarily waived by failure to make it before the examination in chief (*Hill v. Postley*, 90 Va. 200, 17 S. E. 946), and that the question of variance between the pleadings and proof may be raised at any time during the trial if there be an opportunity to avoid the variance by amending the pleadings. *McCormick Harvesting Mach. Co. v. Sendzikowski*, 72 Ill. App. 402.

Apropos of the same question it has been said that evidence may not be objected to as irrelevant after the argument to the jury has been closed (*Farmers' & T. Nat. Bank v. Greene*, 43 U. S. App. 446, 74 Fed. Rep. 439, 20 C. C. A. 500), and that an objection is too late after the submission of the case to the jury. *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Arons v. Smit*, 173 Pa. 630, 34 Atl. 234.

Duer v. Allen, 96 Iowa, 36, 64 N. W. 682; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696; *Blake v. Broughton*, 107 N. C. 220, 12 S. E. 127; *Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644; *Newlon v. Tyner*, 128 Ind. 466, 27 N. E. 168, 28 N. E. 59.

The proper remedy, if remedy there be, is by motion to strike out the answer. It would seem, however, that if the question is not objectionable and if the answer is not responsive to it, that the failure to object to the question will not preclude an objection to the answer. *Malm v. The- lin*, 47 Neb. 686, 66 N. W. 650.

1. Right to call for ground of objection.

A party whose evidence is objected to may require the grounds of objection to be specified in detail sufficiently to enable him to remedy, if remediable.¹

¹*Milliken v. Barr*, 7 Pa. 23; *Harris v. Panama R. Co.* 5 Bosw. 312.

Where, as in Pennsylvania, a general objection is sufficient unless particularity is called for (*Penn Mut. Aid Soc. v. Corley*, 39 Phila. Leg. Int. 139, 11 Ins. L. J. 493), the policy of counsel is to call for the ground. Otherwise often in those jurisdictions where a general objection does not avail, in error or on appeal, if the ground of the objection is such that it could have been obviated had it been disclosed.

The court may exclude evidence upon a general objection which does not state the grounds, if there be sufficient ground for the objection and the counsel seeking to introduce the evidence does not request that the grounds be specified. *Wilson v. Stcers*, 18 Misc. 364, 41 N. Y. Supp. 550.

2. Cross-examining as to competency.

When objection to the competency of evidence arises upon the ex-

amination of a witness,¹ the objector has a right to interpose with cross-examination upon the facts material to the question of competency.²

¹As to the preliminary cross-examination of an expert witness before permitting him to testify, see *ante*, Division VII. § 1.

²Where objection is made to the admissibility in evidence of a document on the ground that it is a privileged communication, the court may properly allow the witness offering it to be cross-examined to show its privileged character before permitting it to be read. *Trussell v. Scarlett*, 18 Fed. Rep. 214, and note.

23. Counter proof as to competency.

On an objection to the competency, either of testimony or a document, the court may allow the objector to interpose with other evidence upon the facts material to it;¹ or, if the question be identical with one in issue, and a prima facie case of competency is made out by the party offering the evidence, the court may (after allowing cross-examination, if the proposed evidence be testimony or a document introduced by testimony) receive the evidence, subject to the right of the adverse party to move to strike it out and have the jury instructed to disregard it, if he shall in due course rebut the apparent competency.

¹*Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384 (so held, notwithstanding an express rule of court giving plaintiff the opening); *Trussell v. Scarlett*, 18 Fed. Rep. 214; *Com. v. Howe*, 9 Gray, 110 (holding that when a judge hears evidence on a question preliminary he should hear all, even though it be a question which more properly should go to the jury). Contra, *Verzan v. McGregor*, 23 Cal. 339, holding it error to receive counterproof on the competency of a document before allowing it to be read to the jury. To the same effect, though conceding the tendency to confuse the jury by not allowing it, is *Crenshaw v. Jackson*, 6 Ga. 509, 50 Am. Dec. 361.

The true rule is, that it is in the sound discretion of the court to pursue either course, as stated in the text.

24. Arguing as to admissibility.

When a question of the admissibility of evidence is duly raised, the party has a right to be heard in argument, but a refusal of the right of argument is not error if the ruling, though without argument, be correct.¹ The court may, in its discretion, hear the argument in the presence² or in the absence of the jury.

¹*Olive v. State*, 11 Neb. 1, 7 N. W. 451.

²*State v. Wood*, 53 N. H. 484.

Counsel while arguing the question of the competency of a document to the

court may read therefrom when necessary for the purpose of his argument. *Rogers v. Winch*, 76 Iowa, 546, 41 N. W. 214.

25. Repeating the objection.

It is not necessary to repeat an objection to evidence sought to be introduced if such objection can only call for a repetition of the court's ruling on the first objection,¹ but if there be a change in the circumstances of the trial so that a situation will be presented to the court upon a repetition of the objection different from that existent when the first objection was made, the objection should be renewed, for otherwise the admission of the evidence will not be reviewed in the appellate court.²

When there is an objection to evidence and the court postpones the ruling it is the duty of the counsel interposing the objection to call the matter to the attention of the court at some subsequent time and demand a ruling upon the objection.³

¹*Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182; *Church v. Howard*, 79 N. Y. 415; *Lyons v. New York Elev. R. Co.* 26 App. Div. 57, 49 N. Y. Supp. 610; *Anglo-American Pkg. & Provision Co. v. Baier*, 20 Ill. App. 376; *Griswold v. Edson*, 32 Minn. 436, 21 N. W. 475, *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824; *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 21 Pac. 114; *Oppenheimer v. Barr*, 71 Iowa, 525, 32 N. W. 499; *Anderson v. White*, 18 Wash. 658, 52 Pac. 231.

But see *Frost v. Goddard*, 25 Me. 414, 418, holding that counsel should call the attention of the court to the evidence when it is attempted to introduce it after a ruling excluding it, and *Wagner v. Jones*, 77 N. Y. 590, where it is held that substantially the same question asked a second time after objection and exception should be objected to, and a failure to renew the objection waives it.

In harmony with this, although the objection be repeated, it is unnecessary to specify the grounds thereof when these were given at the time the former objection was made. *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *Gray v. Brooklyn Union Pub. Co.* 35 App. Div. 286, 55 N. Y. Supp. 35.

Counsel may agree in open court that objections stated to a certain class of testimony may apply to all such testimony and it then becomes unnecessary to repeat the objections, as the appellate court will consider that those objections were timely made to all that class of testimony. *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825.

³*Bailey v. Ogden*, 75 Ga. 874.

An objection to testimony which is apparently admissible when the objection is made, to be available, should be repeated after its inadmissibility has been disclosed by cross-examination. *Heusinkveld v. St. Paul F. & M. Ins. Co.* 106 Iowa, 229, 76 N. W. 696. And when secondary evidence, although objected to and not introduced at one stage of the trial, is admitted subsequent to a cross-examination which tends to re-

move the ground for objection, that objection should be repeated, as, if this is not done, the objection first made will be disregarded upon appeal. *Wheeler v. Van Sickle*, 37 Neb. 651, 56 N. W. 196.

Likewise, when upon a question being asked, "Were any proceedings taken before those arbitrators?" the plaintiff objected to the question as incompetent, irrelevant, and immaterial, the objection will not reach forward and embrace the record which was finally offered, of the proceedings before those arbitrators, and if it is desired to assign error in the admission of the record it must be objected to. *Kern v. Cummings*, 10 Colo. App. 365, 50 Pac. 1051.

¹*Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609; *Norfolk & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 57; *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225.

26. Waiving objections.

After evidence has been admitted over the objection of a party it is necessary that he maintain his hostile position toward it, for otherwise he will waive his objection. If he make the evidence admitted in the face of his objection his own by introducing the same evidence, either on cross-examination¹ or as part of his own case,² he will be deemed to have waived his objection to the admission of the evidence. Nevertheless, these rules do not prevent his cross-examining the witness upon the evidence admitted over his objection³ or preclude the introduction of similar evidence on his own part to meet the case made by the evidence given by his adversary, to which he objected.⁴

¹*Schroeder v. Michel*, 98 Mo. 43, 11 S. W. 314. See also note 1, § 25, *supra*.

The same rule prevails when there is an objection to the competency of a witness and the party objecting waives his objection by cross-examining the witness in such a manner as to make that witness his own. *Miller v. Miller*, 92 Va. 510, 23 S. E. 891.

²*Virginia & T. Coal & I. Co. v. Fields*, 94 Va. 102, 26 S. E. 426; *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Tacoma Light & Water Co. v. Huson*, 13 Wash. 124, 42 Pac. 536.

³*Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Miles v. Chicago, R. I. & P. R. Co.* 76 Mo. App. 484.

⁴*Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Winters v. Manhattan R. Co.* 15 Misc. 8, 36 N. Y. Supp. 772; *Douglas v. New York Elev. R. Co.* 14 App. Div. 471, 43 N. Y. Supp. 847; *Lyons v. New York Elev. R. Co.* 26 App. Div. 57, 49 N. Y. Supp. 610.

By submitting to the discretion of a witness the question whether testimony sought to be introduced is a privileged communication the party waives the right of objecting to the witness's testimony on the ground that it is a privileged communication. *Scates v. Henderson*, 44 S. C. 548, 22 S. E. 724.

X.—RULING ON OFFERS AND OBJECTIONS.

[A statement of objection not indicating its ground is not sufficient to require exclusion, unless the objection be of such a nature that it could not be obviated, or it appear that the party making the offer could not have avoided the ground of objection had it been specifically stated.]

But it is not error to sustain such a general objection if any sufficient ground for it exists, provided that no request be made that the ground be specified.]

1. Questions, how tried.
2. Conditional admission.

3. Objections—authorities in support of strict rules.
4. — nonprejudicial error.

1. Questions, how tried.

Whether evidence is admissible or not is a question of law for the court;¹ and questions of fact incidental to its determination are also for the court to determine for that purpose² even where they are identical with questions at issue for the jury to pass on.³

If the incidental question be in doubt when the evidence is offered, the judge may decide it on the evidence as it then stands;⁴ or, when it is identical with one in issue, may admit the evidence if it be such that the jury might rationally infer the fact, and may leave to them the question what influence it should have, with proper instructions as to the doubt respecting its competency.⁵

¹*Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335; *Carter v. Bennett*, 4 Fla. 283; *American Ins. Co. v. Smith*, 19 Mo. App. 627; *Messner v. Elliott*, 184 Pa. 41, 39 Atl. 46; *DeFrance v. DeFrance*, 34 Pa. 335; *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807.

²As, competency of the witness to testify. *Nelson v. First Nat. Bank*, 32 U. S. App. 554, 69 Fed. Rep. 798, 16 C. C. A. 425; *Clements v. McGinn* (Cal.) 33 Pac. 920.

Or whether a witness has an interest that disqualifies him. *Reynolds v. Lounsbury*, 6 Hill, 534; *Currier v. Bank of Louisville*, 5 Coldw. 460;

Cook v. Mix, 11 Conn. 432; *Labor v. Staniels*, 2 Cal. 240 (holding it error for the judge to leave the question to the jury).

Or whether a witness was competent as an expert. *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731; *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983; *Germania L. Ins. Co. v. Lewin*, 24 Colo. 43, 51 Pac. 488; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Marston v. Dingley*, 88 Me. 546, 34 Atl. 414; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Perkins v. Stickney*, 132 Mass. 217; *Papooshek v. Winona & St. P. R. Co.* 44 Minn. 195, 46 N. W. 329; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053; *Stevens v. Chase*, 61 N. H. 340; *New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co.* 59 N. J. L. 189, 35 Atl. 915; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992; *Jones v. Tucker*, 41 N. H. 546; *Woodworth v. Brooklyn Elev. R. Co.* 22 App. Div. 501, 48 N. Y. Supp. 80; *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56, 14 N. E. 802; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Ryder v. Jacobs*, 182 Pa. 624, 38 Atl. 471; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Wright v. Southern P. Co.* 15 Utah, 421, 49 Pac. 309; *Maughlan v. Burns*, 64 Vt. 316, 23 Atl. 583; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509. And *Robinson v. Ferry*, 11 Conn. 460, held it error for the judge to leave the question to the jury. Or as a nonexpert. *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *Re Wax*, 106 Cal. 343, 39 Pac. 624; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Denning v. Butcher*, 91 Iowa. 425, 59 N. W. 69.

Or whether one whose admission or declaration was sought to be proved was a partner of him against whom it was offered. *Harris v. Wilson*, 7 Wend. 57.

Or whether there was sufficient proof of agency to admit the supposed agent's acts and declarations against the principal. *Cliquot's Champagne*, 3 Wall. 114, *sub nom.* 125 Baskets of Champagne v. United States, 18 L. ed. 116.

Or whether there was a writing such as to preclude oral evidence. *Ratliff v. Huntly*, 27 N. C. (5 Ired. L.) 545.

Or whether a photograph, map, or plat offered for the use of witnesses in explaining their testimony is proved to be a true representation of the subject. *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433; *Blair v. Pelham*, 118 Mass. 420; *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Florida Southern R. Co. v. Parsons*, 33 Fla. 631, 15 So. 338 (holding it reversible error to submit the question to the jury). See also note to *Dedrichs v. Lake City R. Co.* (Utah) 35 L. R. A. 802, 805.

Or whether a communication is or is not confidential. *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532.

Or whether there is sufficient evidence of the loss or destruction of an instrument to admit secondary proof of its contents. *Bain v. Walsh*, 85 Me. 108, 26 Atl. 1001; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Rupert v. Penner*, 35 Neb. 587, 17 L. R. A. 824, 53 N. W. 598; *Scoggins*

v. Turner, 98 N. C. 135, 3 S. E. 719; *Springs v. Schenck*, 106 N. C. 153 11 S. E. 646; *Gorgas v. Hertz*, 150 Pa. 538, 24 Atl. 756; *Norris v. Clink-scales*, 47 S. C. 488, 25 S. E. 797.

Or whether there is sufficient proof of the correctness of an alleged copy of a will, and of the probate and loss of the original, to admit the copy. *Counts v. Wilson*, 45 S. C. 571, 23 S. E. 942.

Or whether there is sufficient proof of the correctness, etc., of books of account to admit them in evidence. *Webster v. San Pedro Lumber Co.* 101 Cal. 326, 35 Pac. 871; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84.

Or the authenticity of a document offered in evidence as an official record. *State ex rel. Stuart v. Maloney*, 113 Mo. 367, 20 S. W. 1064.

Or the sufficiency of the probate of a mortgage before it is admitted in evidence. *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845.

Or whether or not a delinquent tax sale notice was in accordance with the law. But erroneously submitting the question to the jury will not demand reversal if they decide the question rightly. *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609.

Or whether a witness outside the state is "inaccessible" so as to admit his testimony taken at a former trial. *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 20 S. E. 550.

Or whether or not a claim against the United States has been presented and disallowed by the proper accounting officer so as to be admissible upon the trial. *United States v. Patrick*, 36 U. S. App. 645, 73 Fed. Rep. 800. 20 C. C. A. 11.

The rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, applies to the question of preliminary proof to lay a foundation for further evidence or to connect declarations with the party sought to be charged. *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.

A constitutional provision making the jurors the judges of the law as well as the facts in "all prosecutions for libel," cannot deprive the trial judge of power to decide upon the admissibility of proffered evidence. *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624.

And a statute making it the duty of the judge, as a preliminary question, to pass on the genuineness of writings to be used as a standard of comparison, is no invasion of the province of the jury; but is merely a legislative adaptation to the subject-matter of the settled common-law rule that, generally, it is the province of the court to say what is evidence, and the province of the jury to decide on its efficacy. *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.

**Scherpf v. Szadeczky*, 1 Abb. Pr. 366, 4 E. D. Smith, 110; *Prall v. Hinchman*, 6 Duer, 351; *Reynolds v. Lounsbury*, 6 Hill, 534; *Scovell v. Kingsley*, 7 Conn. 284.

**Scherpf v. Szadeczky*, 1 Abb. Pr. 366, 4 E. D. Smith, 110; *Taylor v. Taylor*, 2 Watts, 357.

And in some states it is the exclusive province of the judge to so decide.

Gorton v. Hadsell, 9 Cush. 508; *Harris v. Daugherty*, 74 Tex. 1, 11 S. W. 921; *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225. The reason being, according to *Cairns v. Mooney*, that the admission of illegal evidence has an effect on the jury which is not cured by a direction from the court to disregard it.

But some of the courts hold that in doubtful cases it is not improper to refer the existence of the facts upon which the competency depends to the jury, and in some instances it is intimated that it should be done. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Johnson v. Kendall*, 20 N. H. 304; *Hart v. Heilner*, 3 Rawle, 407; *Haynes v. Hunsicker*, 26 Pa. 58.

*See *Swearingen v. Leach*, 7 B. Mon. 285 (agency; a well-reasoned case).

"A contrary practice would in many instances, as in this, take the whole case from the jury and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions." *Ibid.* To exclude the evidence, where the preliminary fact was such that a jury might rationally infer it, was held error. *Ibid.*

To the same effect, *Funk v. Kincaid*, 5 Md. 404.

As whether a memorandum made after signing a contract was part of it. *Verzan v. McGregor*, 23 Cal. 339.

Or whether a document was used fraudulently. *Winslow v. Bailey*, 16 Me. 319.

Or whether a communication was not made by way of compromise, and therefore inadmissible. *Bartlett v. Hoyt*, 33 N. H. 151; *Hall v. Brown*, 58 N. H. 93. But *Davis v. Charles River Branch R. Co.* 11 Cush. 506, holds it error to leave this question to the jury.

Where the evidence on which the admissibility of the fact depended had already gone to the jury, held, error to refuse to submit the other to them also. *Day v. Sharp*, 4 Whart. 339, 34 Am. Dec. 509.

In *Emerson v. Providence Hat Mfg. Co.* 12 Mass. 237, 7 Am. Dec. 66, it was held that the question of agent's authority to sign, if arising on a writing, was for the court; if oral, for the jury; but this was because the action was on the contract, and the execution of it was the very question in issue.

The case of *Porter v. Wilson*, 13 Pa. 641, well explains the distinction between such a case and the cases where the fact of authority is only preliminary to evidence on a collateral issue.

2. Conditional admission.

It is irregular to allow evidence objected to, to go to the jury, reserving the question of its competency for further consideration,¹ except when consented to by both parties,² or when allowed in the discretion of the court upon the assurance of counsel that he will give evidence to connect.³

¹*McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *National Bank v. Anderson*, 32 S. C. 538, 11 S. E. 379. But *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961, holds the

relevancy and legal effect of the testimony may be reserved for decision at a later stage of the trial.

The reason is that the practice might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491.

Ordinarily such rulings furnish ground for reversal, unless the questions reserved are immaterial or of such character that, if decided against the party raising them, the decision would constitute no sufficient ground of error. *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215; citing *Sharpe v. Freeman*, 45 N. Y. 804; *Lathrop v. Bramhall*, 64 N. Y. 365.

But failure to subsequently rule on a question reserved without objection constitutes no error where there was no subsequent ruling asked as required in the decision of the court admitting the evidence. *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609. Especially where the party who introduced the evidence is the party complaining. *Meserve v. Pomona Land & Water Co.* (Cal.) 34 Pac. 508, 509.

In New Jersey, ruling on the competency of testimony when offered and before actually delivered, or declining to rule until it is actually given, is discretionary with the trial judge. *Fath v. Thompson*, 58 N. J. L. 180, 33 Atl. 391.

²*Hopkins v. Clark*, 90 Hun, 4, 35 N. Y. Supp. 360; *Fuller v. Metropolitan L. Ins. Co.* 68 Conn. 55, 35 Atl. 766.

But express consent need not be shown, for if it is proposed that the evidence be taken conditionally subject to a future decision as to its admissibility, on proper motion, and no objection is made, consent will be implied. *McKnight v. Dunlop*, 5 N. Y. 537.

³*Shepard v. Goben*, 142 Ind. 318, 39 N. E. 506. And see generally on this point, Division IX. § 12.

3. Objections—authorities in support of strict rules.

Whether a trial be long or short, or the exceptions few or many, every party has the right to demand that he shall not be prejudiced by improper evidence.¹ The admission of illegal evidence which bears in the least degree on the result is fatal.² The graver the charge, the more strictly the rules of evidence should be applied.³ It is always better and safer for the court to err in the direction of overstrictness in requiring from counsel adherence to rules.⁴

But this does not mean that material evidence should be excluded; for whatever may be the rule as to the admission of improper evidence, the exclusion of proper evidence which is evidently material and important, and would probably change the result, is equally fatal.⁵

¹*New York Guaranty & Indemnity Co. v. Gleason*, 7 Abb. N. C. 334, 78 N. Y. 503; *Worrall v. Parmelee*, 1 N. Y. 519, 521.

Jury trials should be strictly confined to the issues made, and to the legitimate facts bearing upon them, and the practice of dragging in extrane-

ous matters to influence the jury cannot be too strongly condemned. Upon a closely contested question of fact, slight influences may turn the scale, and every rule of propriety and justice demand that nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the question. *O'Hagan v. Dillon*, 76 N. Y. 170.

**Mexia v. Oliver*, 148 U. S. 664, 37 L. ed. 602, 13 Sup. Ct. Rep. 754; *Cain Lumber Co. v. Standard Dry Kiln Co.* 108 Ala. 346, 18 So. 882; *For-dyce v. McCants*, 51 Ark. 509, 4 L. R. A. 296, 11 S. W. 694; *Gibbs v. Gibbs*, 6 Colo. App. 368, 40 Pac. 781; *Rowland v. Philadelphia, W. & B. R. Co.* 63 Conn. 415, 28 Atl. 102; *Simmons v. Spratt*, 26 Fla. 449, 9 L. R. A. 343, 8 So. 123; *Harris v. Amoskeag Lumber Co.* 97 Ga. 465, 25 S. E. 519; *Holt v. Spokane & P. R. Co.* (Idaho) 35 Pac. 39; *Gurney v. Brown*, 27 Ill. App. 640; *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523; *Strobel v. Moser*, 70 Iowa, 126, 29 N. W. 821; *Missouri P. R. Co. v. Johnson*, 55 Kan. 344, 40 Pac. 641; *Ludlow v. Steffen*, 19 Ky. L. Rep. 1671, 44 S. W. 119; *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *Dillon v. Howe*, 98 Mich. 168, 57 N. W. 102; *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *Desmond v. Levy* (Miss.) 12 So. 481; *Kearney Bank v. Froman*, 129 Mo. 427, 31 S. W. 769; *Thompson v. Wertz*, 41 Neb. 31, 59 N. W. 518; *Root v. Borst*, 142 N. Y. 62, 36 N. E. 814; *Baird v. Gillett*, 47 N. Y. 186, 188; *McMillen v. Aitchison*, 3 N. D. 183, 54 N. W. 1030; *Galion v. Lauer*, 55 Ohio St. 392, 45 N. E. 1044; *Boise v. Aitchison, T. & S. F. R. Co.* 6 Okla. 243, 51 Pac. 662; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9; *Missouri, K. & T. R. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Richardson v. Carbon Hill Coal Co.* 10 Wash. 648, 39 Pac. 95; *Webb v. Big Kanawha & O. R. Packet Co.* 43 W. Va. 800, 29 S. E. 519; *Bartlett v. Beardmore*, 74 Wis. 485, 43 N. W. 492.

And so even in cases of doubt whether the improper evidence really affected the result. *Schwander v. Birge*, 46 Hun, 66; *Totten v. Read*, 32 N. Y. S. R. 46, 10 N. Y. Supp. 318.

And the fact that illegal evidence was admitted on a former trial without objection will not render it competent on the second trial, upon objection being made thereto. *Hunter v. Lanius*, 82 Tex. 677, 18 S. W. 201.

For the laxer rule in equity cases, see N. Y. Code Civ. Proc. § 1003.

**Blackburn v. Beall*, 21 Md. 208.

**Green v. Green*, 26 Mich. 437.

**McKinnon v. Lessley*, 89 Ala. 625, 8 So. 9; *Kleyenstuber v. Robinson* (Ariz.) 52 Pac. 1117; *Re Carpenter*, 79 Cal. 382, 21 Pac. 835; *Cravens v. Bennett*, 17 Colo. 419, 30 Pac. 61; *Schumann v. Torbett*, 86 Ga. 25, 12 S. E. 185; *First Nat. Bank v. Ryan*, 38 Ill. App. 268; *Terre Haute & I. R. Co. v. Jarvis*, 9 Ind. App. 438, 36 N. E. 774; *McNamara v. New Melleray*, 88 Iowa, 502, 55 N. W. 322; *Calvert County Comrs. v. Gannt*, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 822; *Trinity County Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; *Mutual L. Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130; *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

4. — nonprejudicial error.

On the other hand, neither the admission of illegal evidence, nor the exclusion of proper evidence, is fatal error, if the exclusion of the evidence admitted,¹ or the admission of that excluded,² could not in any way affect the result favorably to the party complaining; or if the evidence admitted,³ or excluded,⁴ pertains to a fact otherwise conclusively established; or to a fact not disputed.⁵

Nor can the trial court be convicted of error in admitting improper evidence, where the evidence was subsequently withdrawn from the jury,⁶ or there was subsequently introduced evidence curing the error;⁷ or in excluding proper evidence where the evidence was in fact improper,⁸ or was subsequently admitted.⁹

And a party who puts in illegal evidence not objected to cannot complain that his adversary is permitted to introduce other such, or practically the same, evidence;¹⁰ or that he is himself precluded from following it with other such evidence.¹¹

¹*Hill v. Birmingham Union R. Co.* 100 Ala. 447, 14 So. 201; *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228; *Davies v. Oceanic S. S. Co.* 89 Cal. 280, 26 Pac. 827; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Key v. Abbott*, 99 Ga. 270, 25 S. E. 631; *Schultz v. Babcock*, 166 Ill. 398, 46 N. E. 892; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 41 N. W. 583; *Atchison, T. & S. F. R. Co. v. Shaw*, 56 Kan. 519, 43 Pac. 1129; *Wood v. Finson*, 91 Me. 280, 39 Atl. 1007; *Norwich & W. R. Co. v. Worcester*, 147 Mass. 518, 18 N. E. 409; *McKinnon v. Gates*, 102 Mich. 618, 61 N. W. 74; *Rothschild v. Burritt*, 47 Minn. 28, 49 N. W. 393; *Blackwell v. Graham*, 74 Miss. 595, 21 So. 242; *Chicago, R. I. & P. R. Co. v. George*, 145 Mo. 38, 47 S. W. 11; *Terry v. Beatrice Starch Co.* 43 Neb. 866, 62 N. W. 255; *New Mexican R. Co. v. Hendricks*, 6 N. M. 611, 30 Pac. 901; *Houser v. Beam*, 111 N. C. 501, 16 S. E. 335; *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972; *Portland v. King* (Or.) 26 Pac. 376; *Hoar v. Leaman* (Pa.) 15 Atl. 716; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Boone v. Miller*, 73 Tex. 557, 11 S. W. 551; *Morotock Ins. Co. v. Fostoria Novelty Co.* 94 Va. 361, 26 S. E. 850; *Peck v. Stanfield*. 12 Wash. 101, 40 Pac. 635; *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870; *Wesling v. Kroll*, 78 Wis. 636, 47 N. W. 943.

²*Cowen v. Eartherly Hardware Co.* 95 Ala. 324, 11 So. 195; *Yaeger v. Southern California R. Co.* (Cal.) 51 Pac. 190; *Haley v. Elliott*, 20 Colo. 379, 38 Pac. 771; *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852; *Johnston v. State*, 29 Fla. 558, 10 So. 686; *Littlefield v. Drawdy*, 84 Ga. 644, 11 S. E. 504; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Conner v. Citizens' Street R. Co.* 146 Ind. 430, 45 N. E. 662; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271; *Blodgett v. McMurtry*, 54 Neb. 69, 74 N. W. 392; *Fourth Nat. Bank v. Spinney*, 47 Hun, 293; *Worth v. Simmons*, 121 N. C. 357, 28 S. E. 528; *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045; *Blohme v.*

Lynch, 26 S. C. 300, 2 S. E. 136; *Seyring v. Eschweiler*, 85 Wis. 117, 53 N. W. 164; *Link v. Union P. R. Co.* 3 Wyo. 680, 29 Pac. 741.

**Milliken v. Maund*, 110 Ala. 332, 20 So. 310; *Campbell v. Carnahan* (Ark.) 13 S. W. 1098; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596, 40 Pac. 108; *Curr v. Hundley*, 3 Colo. App. 54, 31 Pac. 939; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L. R. A. 33, 65, 9 So. 661; *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Gulf, C. & S. F. R. Co. v. Jones* (Ind. Terr.) 37 S. W. 208; *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Faulkner v. Davis*, 18 Ky. L. Rep. 1004, 38 S. W. 1049; *Kraatz v. Brush Electric Light Co.* 82 Mich. 457, 46 N. W. 787; *Beard v. First Nat. Bank*, 41 Minn. 153, 43 N. W. 7, 8; *St. Louis Nat. Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773; *Morrill v. Hershfield*, 19 Mont. 245, 47 Pac. 997; *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694; *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 391; *Sawyer v. Choate*, 92 Wis. 533, 66 N. W. 689.

Otherwise, however, if the other evidence to support the fact be merely circumstantial. *Ohio & M. R. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20. And the fact in question is one of the vital issues in the case. *Schneider v. Second Ave. R. Co.* 133 N. Y. 583, 30 N. E. 752:

**Forst v. Leonard*, 116 Ala. 82, 22 So. 481; *Jones v. Malvern Lumber Co.* 58 Ark. 125, 23 S. W. 679; *Conboy v. Dickinson*, 92 Cal. 600, 28 Pac. 809; *St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400, 32 Pac. 822; *Rome R. Co. v. Thompson*, 101 Ga. 26, 28 S. E. 429; *Crone v. Crone*, 170 Ill. 494, 49 N. E. 217, Affirming 70 Ill. App. 294; *Oberholtzer v. Hazen*, 92 Iowa, 602, 61 N. W. 365; *South Scituate v. Scituate*, 155 Mass. 428, 29 N. E. 639; *Miller v. Jurczyk*, 109 Mich. 637, 67 N. W. 898; *Multherin v. Simpson*, 124 Mo. 610, 28 S. W. 86; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Guilfoyle v. Pierce*, 4 App. Div. 612, 38 N. Y. Supp. 697; *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2.

*Admission harmless when fact undisputed. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Eslich v. Mason City & Ft. D. R. Co.* 75 Iowa, 443, 39 N. W. 700; *Missouri, K. & T. R. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166; *Henderson v. Bartlett*, 32 App. Div. 435, 53 N. Y. Supp. 149; *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575; *Girardeau v. Southern Exp. Co.* 48 S. C. 421, 26 S. E. 711; *Wells v. Denver & R. G. W. R. Co.* 7 Utah, 482, 27 Pac. 688.

Exclusion harmless when fact undisputed. *Pittsburgh & W. R. Co. v. Thompson*, 54 U. S. App. 222, 82 Fed. Rep. 720, 27 C. C. A. 333; *Collier v. Coggins*, 103 Ala. 281, 15 So. 578; *Clark v. Olsen* (Cal.) 33 Pac. 274; *Willard v. Mellor*, 19 Colo. 534, 36 Pac. 148; *Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242; *Champaign v. Maguire*, 56 Ill. App. 618; *Bromley v. Goodwin*, 95 Ill. 118; *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. 991; *Peoples v. Evening News Asso.* 51 Mich. 11; *Loudy v. Clarke*, 45 Minn. 477, 48 N. W. 25; *Shotwell v. Gordon*, 121 Mo. 482, 26 S. W. 341; *Cullen v. Gallagher*, 15 Misc. 146, 36 N. Y. Supp. 468; *Blackburn v. St. Paul F. & M. Ins. Co.* 117 N. C. 531, 23 S. E. 456; *Mc*

Bride v. Banguss, 65 Tex. 174; *Glick v. Weatherwax*, 14 Wash. 560, 45 Pac. 156.

**Long v. Booe*, 106 Ala. 570, 17 So. 716; *Chicago & G. T. R. Co. v. Gaciniowski*, 155 Ill. 189, 40 N. E. 601; *Rea v. Scully*, 76 Iowa, 343, 41 N. W. 36; *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781; *McGinnis v. Loring*, 126 Mo. 404, 28 S. W. 750.

But the court should exclude it before counsel's address to the jury. *Pittsburgh, B. & B. R. Co. v. McCloskey*, 110 Pa. 436, 1 Atl. 555.

**Vaca Valley & C. L. R. Co. v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Stewart v. DeLoach*, 86 Ga. 729, 12 S. E. 1067; *Williamson v. Ohnemus*, 67 Ill. App. 341; *Baughan v. Brown*, 122 Ind. 115, 23 N. E. 695; *Amos v. Buck*, 75 Iowa, 651, 37 N. W. 118; *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217; *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 607, 54 N. W. 492; *People's Bank v. Howes*, 64 Minn. 457, 67 N. W. 355; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57; *Avery v. Starbuck*, 3 Silv. N. Y. 507, 27 N. E. 1080; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Beardslee v. Columbia Twp.* 188 Pa. 496, 41 Atl. 617; *Glover v. Thomas*, 75 Tex. 506, 12 S. W. 684; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Kuhn v. McKay* (Wyo.) 49 Pac. 473, 51 Pac. 205.

And the reception of evidence which is proper if supplemented by other evidence is not available error, although the supplemental evidence is not introduced, in the absence of a motion to strike out. *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729.

**Elwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192.

Even though the evidence was improper in part only. *Atchison, T. & S. F. R. Co. v. Myers*, 24 U. S. App. 295, 63 Fed. 793, 11 C. C. A. 439.

Or might have been admissible for another purpose than that for which it was offered. *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807.

Or the reasons given for its exclusion were erroneous. *Eppstein v. Wolfe*, (Tex. Civ. App.) 35 S. W. 52; *Davey v. Southern P. Co.* 116 Cal. 325, 48 Pac. 117.

**Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Noble v. Worthy* (Ind. Terr.) 45 S. W. 137; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752; *Jensen v. Bowles*, 8 S. D. 575, 67 N. W. 627.

And one whose offer is rejected, but who declines to avail himself of a subsequent offer of the court to admit the evidence, cannot complain. *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; *Alabama & V. R. Co. v. Lowe*, 73 Miss. 203, 19 So. 96.

**Chicago, K. & W. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. 495. Contra, *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472; *Phifer v. Carolina C. R. Co.* 122 N. C. 940, 29 S. E. 578.

Refusing defendant permission to cross-examine with reference to matters on which plaintiff has been allowed to introduce evidence, though they are immaterial, and then instructing that such matters are competent and material evidence, was held fatal error, in *Mahoney v. Butte Hardware Co.* 19 Mont. 377, 48 Pac. 545.

"*Lyons v. Teal*, 28 La. Ann. 592.

And see, generally, for cases to support this and the preceding note, *ante*, Division IX. pp. 238 *et seq.*

XI.—EXCEPTIONS.

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| <ol style="list-style-type: none"> 1. Necessity of exceptions; in general. 2. — rulings not concerning conduct of trial. 3. — rulings made during progress of trial; in general. 4. — — conduct of trial judge. 5. — — conduct of counsel. 6. — — juries and jurors. 7. — — evidence and witnesses. 8. — — view by jury. 9. — — instructions and charges. 10. — — verdict. 11. — — dismissal, nonsuit, directing verdict, etc. | <ol style="list-style-type: none"> 12. By whom exceptions to be taken. 13. When to be taken. 14. Sufficiency—form of exception. 15. — anticipatory note of intended exception. 16. — stipulations as to exceptions. 17. — particularity and definiteness; in general. 18. — — exceptions in gross. 19. — — evidence. 20. — — instructions and charges. 21. — — refusal or failure to instruct. 22. — — specifying error. |
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1. Necessity of exceptions; in general.

It is a general rule, with certain exceptions,¹ that an exception to any ruling of the trial court, on an objection duly taken,² is indispensable to a review of that ruling on appeal or error;³ otherwise the error committed by the trial court is deemed to be waived.⁴ But no exception need be taken to a question incidentally and necessarily involved in the consideration of other exceptions duly taken.⁵

¹In some states an exception is held unnecessary to a ruling or decision upon matters which are apparent upon the face of, and constitute, the record proper. *Galloway v. McLean*, 2 Dak. 372, 9 N. W. 98; *Mumma v. Staudte*, 24 Mo. App. 473; *O'Donohue v. Hendrix*, 13 Neb. 255, 13 N. W. 215; *Upper Appomattox County v. Buffalo*, 121 N. C. 37, 27 S. E. 999. So by rule of court in Texas. See *White v. San Antonio Waterworks Co.* 9 Tex. Civ. App. 465, 29 S. W. 252. As, for instance, that the judgment is not supported by the pleadings. *McKinstry v. Carter*, 48 Kan. 428, 29 Pac. 597; *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928. That certain costs were improperly taxed against defendant. *St. Louis, K. C. & C. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210. That the petition states no cause of action. *Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643, 994. That the trial court had not ju-

risdiction of the action. *Roberts v. More*, 5 Colo. App. 511, 39 Pac. 346; *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793. That the question of alimony in a divorce suit was tried before the suit for the divorce. *Re Johnston*, 54 Kan. 729, 39 Pac. 735.

In Maryland it is not obligatory to take a bill of exceptions in a summary proceeding, such as a motion to strike out a judgment, to quash attachments, etc. *Coulbourn v. Fleming*, 78 Md. 210, 27 Atl. 1041, and cases cited.

And a rule of practice of a state court allowing exceptions to be first made on appeal, though not properly saved in the court below, is not made applicable in a Federal court by the act of Congress of 1872, conforming the practice in the Federal courts as near as may be to that of the state courts. *Consumers' Cotton Oil Co. v. Ashburn*, 52 U. S. App. 258, 81 Fed. Rep. 331, 26 C. C. A. 436.

In Nebraska no exception is necessary in order to have a review of the judgment of the district court, dismissing an appeal from a justice of the peace. *Clafin v. American Nat. Bank*, 46 Neb. 884, 65 N. W. 1056. Contra, in Illinois, *Allan v. Foreman Bros.* 69 Ill. App. 56.

And in New York the appellate division of the supreme court has power to reverse for errors committed upon the trial, even though they are not raised by exceptions; such as rulings on matters of evidence and instructions. *Gillett v. Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044; *Re Brundage*, 31 App. Div. 348, 52 N. Y. Supp. 362. The reason is, that the court examines the facts as well as the law, and if the errors committed involve the right of the party to recover it may, in its discretion, grant a new trial. But it must appear that grave injustice has been done and that the reversal is necessary for the purpose of correcting the injustice. *Kowalcwska v. New York, L. E. & W. R. Co.* 72 Hun, 611, 25 N. Y. Supp. 184 (charge of court); *McMurray v. Gage*, 19 App. Div. 505, 46 N. Y. Supp. 608 (ruling on evidence); *Howell v. Manwaring*, 3 N. Y. S. R. 454; *Goodenough v. Fuller*, 5 N. Y. S. R. 896. But it should not be done if the error could have been cured on a proper objection made. *Currier v. Henderson*, 85 Hun, 300, 32 N. Y. Supp. 953, where complaint made was that the charge lacked definiteness. But a valid exception must be taken at the trial in the New York city court to present any question on appeal from a judgment of affirmance of the general term of that court to the appellate term. *Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056. So, too, on appeal from the city court to the common pleas. *Mackie v. Egan*, 6 Misc. 95, 26 N. Y. Supp. 13.

These and other exceptions to the rule generally are due to particular statutes and rules of court, and will be discussed as they occur, with reference to the particular ruling under consideration. For cases, see succeeding notes to this and the following sections.

*As to the necessity generally of an objection being duly taken and preceding the exception, see *Laber v. Cooper*, 7 Wall. 565, 19 L. ed. 151; *Spaur v. Lomax*, 42 Ala. 576; *Benepe v. Wash*, 38 Kan. 407, 16 Pac. 950; *Burks v. Chapman*, 11 Ky. L. Rep. 260; *New Orleans v. Congregation Dispersed of Judah*, 15 La. Ann. 389; *Spencer v. St. Paul & S. C. R. Co.* 22 Minn. 29; *McRaven v. McGuire*, 9 Smedes & M. 34; *Hullar v.*

Wynne, 16 Misc. 580, 38 N. Y. Supp. 700; *Burris v. Whitner*, 3 S. C. N. S. 512; *Sculley v. Book*, 3 Wash. 182, 28 Pac. 556; *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 35 Am. Rep. 292. See also *ante*, Division IX. *Offers of Evidence and Objections*, pp. 228 *et seq.*

In Kentucky, by statute, a party cannot except to a decision made at the instance of his adversary, unless he shall have first objected to the motion, offer, or request for such decision. *Loving v. Warren County*, 14 Bush, 316. But he may except without a previous objection to a decision adverse to him, if made at his own instance.

**Lester v. Georgia, C. & N. R. Co.* 90 Ga. 802, 17 S. E. 113; *Midland R. Co. v. Dickason*, 130 Ind. 164, 29 N. E. 775; *Spelman v. Gill*, 75 Iowa, 717, 38 N. W. 168; *Turner v. State ex rel. Stephenson*, 45 Kan. 554, 26 Pac. 35; *New v. Taylor*, 82 Md. 40, 33 Atl. 435; *New York L. Ins. Co. v. Macomber*, 169 Mass. 580, 48 N. E. 776; *Banks v. Cramer*, 109 Mich. 168, 66 N. W. 946; *Lawrence v. Bucklen*, 45 Minn. 195, 47 N. W. 655; *Sawyers v. Drake*, 34 Mo. App. 472; *Roode v. Dunbar*, 9 Neb. 95, 2 N. W. 345; *Reese v. Kinkead*, 20 Nev. 65, 14 Pac. 871; *Duryea v. Vosburgh*, 121 N. Y. 57, 24 N. E. 308; *Wicks v. Thompson*, 129 N. Y. 634, 29 N. E. 301; *Wills v. Fisher*, 112 N. C. 529, 17 S. E. 73; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Potter v. Langstrath*, 151 Pa. 216, 25 Atl. 76; *Crawford v. McGinty* (Tex.) 11 S. W. 1066; *Miles v. Albany*, 59 Vt. 79, 7 Atl. 601; *Brown v. Forest*, 1 Wash. Terr. 201.

In *Behrens v. McCance*, 106 Ind. 330, 6 N. E. 912, the court said: "It is definitely settled by a long line of decisions that where there is an appearance to the action, an exception to the ruling of a *nisi prius* court is absolutely necessary to present any question to this court by appeal, except in two contingencies: (1) where the court has no jurisdiction of the subject-matter of the action; (2) where the complaint does not state facts sufficient to constitute a cause of action."

And, according to *Crawford v. McGinty* (Tex.) 11 S. W. 1066, in the absence of exceptions or the statement of facts, unless failure to except be waived or not insisted on, the only inquiry is whether the pleadings justify the judgment.

Nor can the form in which a question of law was reserved be questioned, unless an exception was duly taken. *Blake v. Metzgar*, 150 Pa. 291, 24 Atl. 755.

**Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998.

**Parker v. Waycross & F. R. Co.* 81 Ga. 387, 8 S. E. 871; *Jordan v. Kavanaugh*, 63 Iowa, 152, 18 N. W. 151; *Browne v. Raleigh & G. R. Co.* 108 N. C. 34, 12 S. E. 958.

2. — rulings not concerning conduct of trial.

Within the rule just stated, an exception is generally necessary to a decision or ruling on an objection which does not necessarily or immediately concern the conduct of the trial.¹ Included in these are such decisions or rulings as the rejection of a plea,² the decision on a demurrer,³ on a motion to dismiss,⁴ or for judgment on the pleadings,⁵ or to require an election,⁶ or to amend,⁷ or to strike out.⁸

So too, an exception is necessary to an order denying a postponement,⁹ denying the right of trial by jury,¹⁰ and to a decision on application for a change of venue.¹¹

⁹*Moore v. Newell*, 94 N. C. 265.

As refusal of a discovery sought. *Peterson v. Gresham*, 25 Ark. 380. Or dismissal as to one of two joint defendants in an action of tort. *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17. Or an order substituting a party plaintiff. *Maul v. Drexel*, 55 Neb. 446, 76 N. W. 163. Or granting a motion for a speedy trial, and trying the case out of its regular order. *Caveny v. Weiller*, 90 Ill. 158. Or denying a motion to quash a writ of mandamus. *Lamkin v. Sterling*, 1 Idaho, 120.

As to the necessity of an exception to decisions or rules on questions relative to the taxation of costs, see *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Darst v. Collier*, 86 Ill. 96; *Sisson v. Pearson*, 44 Ill. App. 81; *State ex rel. Littleton v. Brewer*, 70 Iowa, 384, 30 N. W. 646; *Barry v. McGrade*, 14 Minn. 286, Gil. 214; *Roberts v. Drehmer*, 41 Neb. 306, 59 N. W. 911; *Allbright v. Corley*, 54 Tex. 372; *Cord v. Southwell*, 15 Wis. 211.

But in some states, by statute, formal exceptions are not necessary to interlocutory orders finally determining the rights of the parties, appealable orders, decisions on demurrers, orders made on *ex parte* applications, and orders made in the absence of the party; as in California, Code Civ. Proc. § 647; *Davis v. Honey Lake Water Co.* 98 Cal. 415, 33 Pac. 270 (order striking out demurrer).

Such a statute was no doubt enacted for the benefit of parties who, through inadvertence or other cause, should fail to take an exception to orders or decisions therein mentioned, when they were present, and also for those parties who should be absent when the order or decision was made or rendered. But it does not relieve the party against whom the order or decision is made or rendered of the necessity of presenting and having settled a bill showing that he is entitled to the benefit of the presumed statutory exception. *Bostwick v. Knight*, 5 Dak. 305, 40 N. W. 344; *Lamet v. Miller* (Cal.) 11 Pac. 744; *Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607; *Guthrie v. Phelen*, 2 Idaho, 89, 6 Pac. 107.

And a presumption of the party's absence is not raised by the fact that the court before ruling took the matter under advisement. *Lamet v. Miller* (Cal.) 11 Pac. 744.

And a decision on an objection to the introduction of evidence, on the ground that the complaint states no cause of action, is not a decision of a demurrer, within the meaning of such a statute. *Ross v. Wait*, 2 S. D. 638, 51 N. W. 866. Nor is a ruling on evidence an order within the terms of such a statute. *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

¹⁰*Young v. Donegan* (Cal.) 29 Pac. 462; *Huntington v. Chambers*, 15 Ill. App. 426; *Cook v. Steuben County Bank*, 1 G. Greene, 447; *Equitable Mortg. Co. v. Thorn* (Tex. Civ. App.) 26 S. W. 276; *White v. Toncray*, 9 Leigh, 347; *Bowyer v. Hewitt*, 2 Gratt. 193; *Hart v. Baltimore & O. R. Co.* 6 W. Va. 336.

¹¹*Galloway v. Carlisle*, 15 Colo. 244, 25 Pac. 316; *Turner v. State ex rel.*

Stephenson, 45 Kan. 554, 26 Pac. 35; *Lott v. Kansas City, Ft. S. & G. R. Co.* 42 Kan. 293, 21 Pac. 1070; *State ex rel. Rowe v. Weaver*, 123 Ind. 512, 24 N. E. 330; *Beaven v. Phillips*, 83 Ky. 89; *Burdick v. Kenyon*, 20 R. I. 498, 40 Atl. 99. So, also, as to refusal of leave to plead over, after demurrer sustained. *Powell v. Asten*, 36 Ala. 140.

Contra, *Marshall v. Cleveland, C. C. & St. L. R. Co.* 80 Ill. App. 531; *Lee v. Rutledge*, 51 Md. 311; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214. Where the ground of demurrer is that the complaint or petition fails to state a cause of action. *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Behrens v. McCance*, 106 Ind. 330, 6 N. E. 912; *St. Paul v. Kuby*, 8 Minn. 154, Gil. 125; *Territory ex rel. Blake v. Virginia Road Co.* 2 Mont. 96. And by statute in some states. *Efurd v. Loeb*, 82 Ala. 429, 3 So. 3; *Jones v. Townsend*, 21 Fla. 438, 58 Am. Rep. 676; *Barnes v. Scott*, 29 Fla. 285, 11 So. 48; *Ross v. Wait*, 2 S. D. 638, 51 N. W. 866. And by rule of court in Texas. *White v. San Antonio Waterworks Co.* 9 Tex. Civ. App. 465, 29 S. W. 252. See also note 1, *supra*. And *Long v. Billings*, 7 Wash. 267, 34 Pac. 936, holds that an exception is not necessary to a judgment dismissing the action after demurrer sustained. Or to judgment against defendant on sustaining a demurrer to his answer. *Coffman v. Wilson*, 2 Met. (Ky.) 542.

***As**, for plaintiff's failure to give security for costs. *Hyde v. Adams*, 80 Ala. 111. For the rule as to necessity of exceptions to rulings on motions to dismiss at trial, see *infra*, § 11.

***Robbins v. Butler**, 13 Colo. 496, 22 Pac. 803; *Security Sav. & L. Asso. v. Anderson*, 172 Pa. 305, 34 Atl. 44.

Contra, *Lamet v. Miller* (Cal.) 11 Pac. 744; *Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.

***Finley v. Brown**, 22 Iowa, 538; *Hammett v. Truworthly*, 51 Mo. App. 281. **Contra**, *Barnes v. Scott*, 29 Fla. 285, 11 So. 48.

***McNutt v. King**, 59 Ala. 597; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Pettis v. Campbell*, 47 Ga. 596; *McFarland v. Claypool*, 128 Ill. 398, 21 N. E. 587; *Knowles v. Rexroth*, 67 Ind. 59; *Alcorn v. Morgan*, 77 Ind. 184; *Jouitt v. Lewis*, 4 Litt. (Ky.) 160; *Sutherland v. Kittridge*, 19 Me. 424; *Holliday v. Mansker*, 44 Mo. App. 465; *Wallace v. Baisley*, 22 Or. 572, 30 Pac. 432; *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785. **Contra**, *Cumber v. Schoenfeld*, 16 Daly, 454, 12 N. Y. Supp. 282.

And *Lamb v. Beaumont Temperance Hall Co.* 2 Tex. Civ. App. 289, holds that it is necessary to except to the action of the court, allowing a supplemental petition to be filed, setting up facts which should have been brought in by amendment.

But according to *Giddings v. 76 Land & Water Co.* 109 Cal. 116, 41 Pac. 788, an order denying a motion for leave to file a supplemental complaint need not be excepted to.

***Mahoney v. O'Leary**, 34 Ala. 97; *Blackford v. Killan*, 42 Ala. 487; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa, 556, 53 N. W. 310; *State use of Sly v. Steinman*, 18 Mo. 201; *Martin v. Jones*, 72 Mo. 23; *Gorwyn v. Anabel*, 48 Mo. App. 297; *Kratz v. Dawson*, 3 Wash. Terr. 100, 13 Pac. 663.

In California it is necessary to except to an order denying a motion to

strike out the pleading. *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92. But not to an order granting such a motion. *Davis v. Honey Lake Water Co.* 98 Cal. 415, 33 Pac. 270.

**Davis v. Patrick*, 12 U. S. App. 629, 57 Fed. Rep. 909, 6 C. C. A. 632; *Coad v. Home Cattle Co.* 32 Neb. 761, 49 N. W. 757. For other cases see *ante*, Division I. *Applications to Postpone*, § 39.

¹⁰ *Klotz v. Perteet*, 101 Mo. 213, 13 S. W. 955. Contra, *Meech v. Brown*, 4 Abb. Pr. 19, 1 Hilt. 257.

¹¹ *Scott v. Neises*, 61 Iowa, 62, 15 N. W. 663; *Goodnow v. Plumb*, 67 Iowa, 661, 25 N. W. 870; *Klotz v. Perteet*, 101 Mo. 213, 13 S. W. 955; *Evans v. Trenton*, 112 Mo. 390, 20 S. W. 614; *Muller v. Bayly*, 21 Gratt. 521; *Church v. Milwaukee*, 31 Wis. 512.

3. — rulings made during progress of trial; in general.

It is a rule with but few exceptions, that to secure a review on appeal or error, of alleged erroneous rulings or decisions made or rendered during the progress of the trial, a timely exception thereto must have been saved.¹

¹*Otterbach v. Patch*, 5 App. D. C. 69; *Utter v. Jaffray*, 114 Ill. 470, 2 N. E. 494; *Messerly v. Hull*, 60 Mo. App. 132; *Duckwitz v. Fuller*, 7 App. Div. 372, 40 N. Y. Supp. 965; *Floyd v. Hotchkiss*, 5 Pa. Super. Ct. 216; *Montague v. Allan*, 78 Va. 592.

As, overruling a motion for a change of judge. *Syndicate Improv. Co. v. Bradley* (Wyo.) 43 Pac. 79. Trying and presenting to the jury the case on issues not raised by the pleadings. *Price v. Burlington, C. R. & M. R. Co.* 42 Iowa, 16. Allowing objectionable matter in a pleading to be read to the jury. *Western U. Teleg. Co. v. Smith* (Tex. Civ. App.) 33 S. W. 742. Permitting the severance of defenses. *Commercial & R. Bank v. Lump*, 7 How. (Miss.) 414. Refusing to discharge the jury for misconduct of a juror. *Leeser v. Boekhoff*, 38 Mo. App. 445. Limiting the number of witnesses on any particular point. *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363. Requiring an election by plaintiff in replevin whether he will proceed for the return of the property or for its value and damages. *Tuckwood v. Hanthorn*, 67 Wis. 326, 30 N. W. 705. Imposing or refusing to impose the burden of proof. *O'Farrell v. Metropolitan L. Ins. Co.* 22 App. Div. 495, 48 N. Y. Supp. 199, 23 App. Div. 623, 48 N. Y. Supp. 695; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042.

4. — — conduct of trial judge.

So, the propriety of the conduct or remarks of the judge presiding at the trial will not be considered by the appellate court unless, on a seasonable objection made, an exception was saved to the ruling thereon.¹

¹*People v. Abbott*, 101 Cal. 645, 36 Pac. 129; *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546; *Mulliner v. Bronson*, 114 Ill. 510, 2 N. E. 671; *Vass v. Waukesha*, 90 Wis. 337, 60 N. W. 280.

As stopping the cross-examination of a witness on matters as being immaterial. *Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746. Absenting himself from the courtroom during a portion of the trial. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269. Leaving the bench and pointing out from plaintiff's chart plaintiff's theory of the action. *Irvin v. Kutruff*, 152 Pa. 609, 25 Atl. 796. A remark that the jury had evidence enough on a certain point. *Cromer v. State*, 21 Ind. App. 502, 52 N. E. 239.

5. — — conduct of counsel.

And it is now settled that, in order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done, and an exception duly saved to its refusal so to do.¹

¹*Shelp v. United States*, 48 U. S. App. 376, 81 Fed. Rep. 694, 26 C. C. A. 570; *Kansas City, M. & B. R. Co. v. Webb*, 97 Ala. 157, 11 So. 888; *Poullain v. Poullain*, 79 Ga. 11, 4 S. E. 81; *Grand Lodge A. O. U. W. v. Belcham*, 145 Ill. 308, 33 N. E. 886; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Blair v. Madison County*, 81 Iowa, 313, 46 N. E. 1093; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 712, 16 Pac. 146; *Bland v. Gaither* (Ky.) 11 S. W. 423; *Brinkley v. Platt*, 40 Md. 529; *Bedford v. Penney*, 65 Mich. 667, 32 N. W. 888; *Nichols v. Metzger*, 43 Mo. App. 607; *Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *Bankers Life Asso. v. Lisco*, 47 Neb. 340, 66 N. W. 412; *Wilkins v. Anderson*, 11 Pa. 399; *Laue v. Madison*, 86 Wis. 453, 57 N. W. 93; *Gulf, C. & S. F. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129.

But if the transgression be so flagrant, if the offensive remark has stricken so deep and is of such character, that neither rebuke nor retraction can destroy its sinister influence, a new trial should be awarded regardless of the want of objection and exception. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462.

6. — — juries and jurors.

So, too, a seasonable exception is necessary to a review of any alleged error or irregularity in the drawing, summoning, or impaneling of trial jurors;¹ in accepting as competent jurors objected to as incompetent;² and excluding as incompetent jurors claimed to be competent.³

¹*Alexander v. United States*, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350; *Jones v. State*, 100 Ala. 209, 14 So. 115; *Ohio & M. R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; *Preston v. Hannibal & St. J. R. Co.* 132 Mo. 111, 33 S. W. 783; *Com. v. Ware*, 137 Pa. 465, 20 Atl. 680; *Hobbs v. State* (Tex. Crim. App.) 28 S. W. 814.

²*Territory v. Bryson*, 9 Mont. 32.

³*Voorhees v. Dorr*, 51 Barb. 580.

7. — — evidence and witnesses.

So, failure to except to the action of the trial court in admitting improper evidence,¹ or in excluding proper evidence,² or in passing upon the competency of a witness,³ or the propriety of a question propounded to a witness,⁴ waives any error therein, and precludes its consideration by the appellate court.

So, also, the objection that evidence was offered out of order can be noticed only on proper exception saved.⁵

And a decision on a motion to strike out,⁶ or on an objection to a deposition,⁷ must be excepted to.

¹*Newport News & M. Valley Co. v. Pace*, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 745; *Quinn v. Ft. Payne* (Ala.) 12 So. 413; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Colorado M. R. Co. v. Brown*, 15 Colo. 195, 25 Pac. 87; *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 322; *Moffett-West Drug Co. v. Byrd* (Ind. Terr.) 43 S. W. 864; *McGurvy v. Roods*, 73 Iowa, 363, 35 N. W. 488; *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314; *Benepe v. Wash*, 38 Kan. 407, 16 Pac. 950; *Branson v. Com.* 92 Ky. 330, 17 S. W. 1019; *Gueringer v. His Creditors*, 33 La. Ann. 1279; *McCullough v. Biedler*, 66 Md. 283, 7 Atl. 454; *Powers v. Boston Gaslight Co.* 158 Mass. 257, 33 N. E. 523; *Holman v. Union Street R. Co.* 114 Mich. 308, 72 N. W. 202; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261; *Robyn v. Chronical Pub. Co.* 127 Mo. 385, 30 S. W. 130; *Hyman v. State*, 74 Miss. 829, 21 So. 971; *Kleinschmidt v. Her*, 6 Mont. 123, 9 Pac. 901; *Bennett v. McDonald*, 52 Neb. 278, 72 N. W. 263; *Palmer v. Culverwell* (Nev.) 50 Pac. 1; *Wicks v. Thompson*, 129 N. Y. 634, 29 N. E. 301; *Ferrell v. Thompson*, 107 N. C. 420, 10 L. R. A. 361, 12 S. E. 109; *Philadelphia Trust, S. D. & Ins. Co. v. Purves* (Pa.) 13 Atl. 936; *Mains v. Lederer*, 21 R. I. pt. 2, p. 164, 43 Atl. 876; *Sahlén v. Bank of Lonokey*, 90 Tenn. 221, 16 S. W. 373; *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *Clark v. Hodges*, 65 Vt. 273, 27 Atl. 726; *Lamberts v. Cooper*, 29 Gratt. 61; *Lewis v. McDougall*, 19 Wash. 388, 53 Pac. 664.

Contra, in equity. *Cochrane v. Breckenridge*, 75 Iowa, 213, 39 N. W. 274. And by statute in actions in the New Jersey district court in which the demand for damages does not exceed \$200. *Oliphant v. Brearley*, 54 N. J. L. 521, 24 Atl. 660.

But failure of a party who has once taken exception to a certain line and character of evidence, to renew the objection at each recurrence of the objectionable matter arising in the examination of other witnesses, will not debar him from having the exception reviewed on appeal. *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577.

²*Newmark v. Marks* (Ariz.) 28 Pac. 960; *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 103; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183; *McReynolds v. McReynolds*, 74 Iowa, 89, 36 N. W. 903; *Thorne v. Fox*, 67 Md. 67, 3 Atl. 667; *Chicago, S. F. & C. R. Co. v. Elliott*, 117 Mo. 549, 24 S. W. 53; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Warfel v. Knott*, 123 Pa. 528, 18 Atl. 390; *Collier v. Jenks*, 19 R. I. 137, 32 Atl. 208; *Durham v. Atwell* (Tex. Civ. App.) 27 S. W. 316; *Lewis v. McDougall*, 19 Wash.

388, 52 Pac. 664; *John R. Davis Lumber Co. v. First Nat. Bank*, 90 Wis. 464, 63 N. W. 1018.

So also of exclusion of evidence by refusing to reopen the case. *Barnum v. Andrews*, 106 Mich. 81, 63 N. W. 983. And of refusal to permit cross-examination. *Cone v. Montgomery*, 25 Colo. 277, 53 Pac. 1052.

The appellate division of the New York supreme court, however, is not precluded from reviewing the correctness of a ruling on evidence, whether of its admission or exclusion, because of the lack of an exception. *Re Brundage*, 31 App. Div. 348, 52 N. Y. Supp. 362. And see note 1, § 1, *supra*.

⁴*Downey v. Hicks*, 14 How. 240, 14 L. ed. 404; *Walker v. State*, 34 Fla. 167, 16 So. 80; *Brown v. Foster*, 112 Mo. 297, 20 S. W. 611; *Case v. Case*, 49 Hun, 83, 1 N. Y. Supp. 714.

⁴*Scott v. Lloyd*, 9 Pet. 418, 9 L. ed. 178; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Tischler v. Apple*, 30 Fla. 132, 11 So. 273; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

⁴*Olmstead v. Webb*, 5 App. D. C. 38.

⁴*Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705; *Ayers v. Ames* (Iowa) 74 N. W. 741; *State v. McCollum*, 119 Mo. 469, 24 S. W. 1021; *Republican Valley R. Co. v. Boyse*, 14 Neb. 130, 15 N. W. 364.

⁴*Gardner v. Haynie*, 42 Ill. 291; *Jones v. Loggins*, 37 Miss. 546; *Dawson v. Dawson*, 26 Neb. 716, 42 N. W. 744; *Looper v. Bell*, 1 Head, 373; *Noell v. Bonner* (Tex. Civ. App.) 21 S. W. 553; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 937. Otherwise, however, of an objection to a deposition on the ground of incompetency. *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 937.

8. — — view by jury.

Consideration by the appellate court of a ruling by the trial court on a request for a view by the jury is precluded by failure to save a timely exception thereto.¹

¹*Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 149, 38 N. E. 556; *Gilmore v. H. W. Baker Co.* 12 Wash. 468, 41 Pac. 124.

9. — — instructions and charges.

The correctness of instructions and charges given¹ or refused² cannot be questioned in the appellate court if no timely exception was saved in the trial court, unless otherwise expressly provided by statute,³ or failure to except is otherwise excused.⁴

¹*Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451; *Allingham v. Rix* (Cal.) 28 Pac. 579; *Pielke v. Chicago, M. & St. P. R. Co.* 6 Dak. 444, 43 N. W. 813; *McSwain v. Howell*, 29 Fla. 248, 10 So. 588; *Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33; *Lowell v. Gathright*, 97 Ind. 313; *Liefheit v. Jos. Schlitz Brewing Co.* 106 Iowa, 451, 76 N. W. 730; *Missouri P. R. Co. v. Johnson*, 44 Kan. 660, 24 Pac. 1116; *Kennedy v. Cun-*

ningham, 59 Ky. 538; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; *Russell v. Plaisted*, 151 Mass. 71, 23 N. E. 722; *Longyear v. Gregory*, 110 Mich. 277, 68 N. W. 116; *Shatto v. Abernethy*, 35 Minn. 538, 29 N. W. 325; *Drake v. Surget*, 36 Miss. 458; *McDonald v. Cobb*, 44 Mo. App. 167; *Burnet v. Cavanaugh*, 56 Neb. 190, 76 N. W. 578; *Jenkins v. Dean*, 130 N. Y. 275, 29 N. E. 126; *Curtis v. Winston*, 186 Pa. 492, 40 Atl. 786; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956; *Hilton v. Advance Thresher Co.* 8 S. D. 412, 66 N. W. 816; *Thirkfield v. Mountain View Cemetery Asso.* 12 Utah, 76, 41 Pac. 564; *Wheatley v. Waldo*, 36 Vt. 237; *State v. Anderson*, 20 Wash. 193, 55 Pac. 39; *Simonds v. Baraboo*, 93 Wis. 40, 67 N. W. 40.

So, also, as to part of a charge. *Norris v. Kipp*, 74 Iowa, 444, 38 N. W. 152; *Homiston v. Long Island R. Co.* 8 Misc. 687, 23 N. Y. Supp. 658; *Bremmer v. Green Bay, S. P. & N. R. Co.* 61 Wis. 114, 20 N. W. 687.

Or that it was given orally, when it should have been in writing. *Sans Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642.

**Barrow v. Reab*, 9 How. 366, 13 L. ed. 177; *Leahy v. Southern P. R. Co.* 65 Cal. 150, 3 Pac. 622; *Stewart v. Mills*, 18 Fla. 57; *Krug v. Ward*, 77 Ill. 603; *Stewart v. Murray*, 92 Ind. 543, 47 Am. Rep. 167; *Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335; *Runnells v. Peniwater*, 109 Mich. 512, 67 N. W. 558; *Omaha v. McGavock*, 47 Neb. 313, 66 N. W. 415; *Roberts v. Lloyd*, 4 N. Y. Supp. 446; *Trumbo v. City Street Car Co.* 89 Va. 780, 17 S. E. 124; *Blumberg v. McNear*, 1 Wash. Terr. 141; *Thrasher v. Postal*, 79 Wis. 503, 48 N. W. 600.

So, as to a modification of a requested charge. *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956; *Trumbo v. City Street Car Co.* 89 Va. 780, 17 S. E. 124.

**Waterbury v. Russell*, 8 Baxt. 159; *International, T. & S. F. R. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833.

Thus, a Montana statute declares that instructions shall be deemed excepted to without formal exception thereto being taken. See *Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281. But to be reviewed they must be incorporated, together with so much of the evidence as is necessary to explain them, in the bill of exceptions. *Kleinschmidt v. McDermott*, 12 Mont. 309, 30 Pac. 393.

So, by statute in Alabama, it is not necessary to except to the action of the court in giving or refusing a charge requested in writing. See *Wesson v. State*, 109 Ala. 61, 19 So. 514. But the mere indorsement "given" or "refused," with the signature of the trial judge, on charges requested, does not make them a part of the record; but they must be presented by incorporation in a bill of exceptions and properly assigned as errors. *Wesson v. State*, 109 Ala. 61, 19 So. 514; *Nuckols v. State*, 109 Ala. 2, 19 So. 504.

So, in Colorado, the Code dispenses with the necessity of taking exceptions to the giving, refusing, or modifying of instructions. But it has been held that this does not do away with the reason or necessity for making objections in some appropriate way, in such time and manner as to give the trial court an opportunity to correct the instruction, if found erroneous. *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79. And it would seem from *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882, that if an appellant wishes to preserve his right to an appellate review of the

instruction complained of, he should have either the objection or exception appear in the record as having been properly saved. But in *Denver & R. G. R. Co. v. Bedell*, 11 Colo. App. 139, 54 Pac. 280, the appellate court, for the purpose of sustaining a judgment for plaintiff, which was attacked on the ground that there was an inconsistency between the general verdict and a special finding, which entitled defendant to judgment notwithstanding the verdict, took notice that an instruction through which the inconsistency was sought to be deduced was erroneous, although no exception was taken thereto.

In North Carolina it is not necessary to except to charges given or refused at the trial; but it is sufficient under the statute and a rule of court if they are set out by appellant in preparing his case on appeal. *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175; *Marriner v. John L. Roper Lumber Co.* 113 N. C. 52, 18 S. E. 94.

And in Ohio, if the record shows that a motion for a new trial was made on the ground that the verdict was against the law and the evidence and that the overruling of the motion was assigned for error, and that all the evidence offered on the trial, together with the charge of the court, has been properly brought up by the bill, the reviewing court will, in connection with the evidence, examine the charge, whether excepted to or not. *Weybright v. Fleming*, 40 Ohio St. 52; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318.

***Thus**, failure to except to a further instruction on the jury returning into court after they had retired to consider their verdict, and in the absence of counsel, on a matter material to his client, and adverse to his interests, will not preclude consideration by the appellate court of the correctness of the instruction. *Wheeler v. Sweet*, 137 N. Y. 435, 33 N. E. 483. But *Stewart v. Wyoming Cattle Rancho Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101, disposes of this question thus: "The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

And the general term or appellate division of the New York supreme court will review instructions given or refused, though not formally excepted to on the trial. *Jacobs v. Sire*, 4 Misc. 398, 23 N. Y. Supp. 1063; *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596. So also will the general term of the common pleas court. *Austin v. Staten Island Rapid Transit R. Co.* 39 N. Y. S. R. 76, 14 N. Y. Supp. 923. Otherwise, however, on appeal from the New York city court to the general term of that court. *Imperial Bldg. Co. v. J. H. Woodbury Dermatological Inst.* 59 N. Y. Supp. 186. Or to the general term of the common pleas court. *Crane v. Schloss*, 39 N. Y. S. R. 92, 14 N. Y. Supp. 886.

To authorize a review by the general term without exceptions it must be evident that the trial court misunderstood the law, and misled and misdirected the jury. *Ackart v. Lansing*, 6 Hun, 476; *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596. And even this practice does not do away with and revoke the usual and salutary rule that where a trial

judge misstates the law to the jury, or omits to state propositions which should properly have been stated, it is the duty of counsel to except to the charge, or request the judge to submit the omitted propositions and except to the refusal. *Goodenough v. Fuller*, 5 N. Y. S. R. 896.

But a local practice of a trial court to regard as excepted to all instructions given or refused will not obviate the necessity of an exception unless that practice is made to appear upon the face of the record. *Steyer v. Curran*, 48 Iowa, 580.

10. — — verdict.

Some of the courts will not consider an objection to the form of the verdict unless that objection was called to the attention of the trial court, and an exception duly saved;¹ while others hold that no exception is necessary.²

So, again, the objection that the verdict is not supported by evidence will not be heard by some courts unless presented on a proper exception.³

And the correctness of a ruling on a motion to set aside a verdict will only be considered on a proper exception duly saved.⁴

¹*Raulerson v. Rockner*, 17 Fla. 809; *McNally v. Weld*, 30 Minn. 209, 14 N. W. 895; *Chapman v. White*, 52 Mo. 179; *Sternberger v. Bernheimer*, 121 N. Y. 194, 24 N. E. 311; *Kuhlman v. Williams*, 1 Okla. 136, 28 Pac. 867; *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

²*French v. Hotchkiss*, 60 Ill. App. 580; *Halderman v. Birdsall*, 14 Ind. 304. Especially where the verdict is based on an erroneous charge. *Levy v. Klepner*, 15 Misc. 643, 37 N. Y. Supp. 582.

³*Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056; *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952.

Contra, of a case on review by the general term of the supreme court. See *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952.

And the fact that at the close of plaintiff's case a motion to dismiss or for a directed verdict was denied under an exception will not avail without an exception, when the issues were submitted, having been then taken to an adverse ruling upon a like motion to dismiss or for directed verdict. *Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056.

⁴*Nicol v. Hyre*, 58 Mo. App. 134.

11. — — dismissal, nonsuit, directing verdict, etc.

Failure to except to a ruling granting¹ or denying² a nonsuit or dismissal, or to a ruling on a motion for a directed verdict,³ is fatal to the right of review.

So, also, an exception is necessary to bring up for review a refusal of the court to take off a nonsuit.⁴

¹*Palmer v. Bice*, 28 Ala. 430; *Vincent v. Rogers*, 30 Ala. 471; *Wyatt v. Evans*, 52 Ala. 285; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Nelmes v. Wilson* (Cal.) 34 Pac. 341; *McBride v. Latham*, 79 Ga. 661, 4 S. E.

928; *Blair v. Pray*, 103 Ill. 615; *Heddy v. Driver*, 6 Ind. 350; *Stewart v. Davenport*, 23 Minn. 346; *Harper v. Dail*, 92 N. C. 394; *Harrison v. Bank of Illinois*, 9 Mo. 161; *Pendleton v. Weed*, 17 N. Y. 72. The decision not being an order finally determining the rights of the parties and deemed to be excepted to, within the meaning and terms of a California statute. *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063.

**Witkowski v. Hern*, 82 Cal. 604, 23 Pac. 132; *Oakes v. Thornton*, 28 N. H. 44; *Plumer v. Marathon County Supers.* 46 Wis. 163; *Brown v. Warren*, 16 Nev. 228. So, on appeal to the general term of the New York common pleas court. *VanDoren v. Jelliffe*, 1 Misc. 354, 26 N. Y. Supp. 636.

Contra, *Ballentine v. White*, 77 Pa. 20; *Payton v. Sherburne*, 15 R. I. 213, 2 Atl. 300. And on appeal from the New York city court to the general term of the common pleas. *Hopkins v. Clark*, 14 Misc. 599, 36 N. Y. Supp. 456.

**Dunham Towing & Wrecking Co. v. Dandelin*, 143 Ill. 409, 32 N. E. 258; *Stock Quotation Teleg. Co. v. Chicago Bd. of Trade*, 144 Ill. 370, 33 N. E. 42; *Haniford v. Kansas*, 103 Mo. 172, 15 S. W. 753; *Schwartz v. Family Fund Soc.* 26 Jones & S. 515, 12 N. Y. Supp. 717, 13 N. Y. Supp. 888; *Curtis v. Wheeler & W. Mfg. Co.* 141 N. Y. 511, 36 N. E. 596; *Smith v. Simmons*, 66 Hun, 628, 21 N. Y. Supp. 47; *DeLendrecie v. Peck*, 1 N. D. 422, 48 N. W. 342; *Burke v. Noble*, 48 Pa. 168; *Kirch v. Davies*, 55 Wis. 287, 11 N. W. 689; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *McKinnon v. Atkins*, 60 Mich. 418, 27 N. W. 564.

Contra, *Loving v. Warren County*, 14 Bush. 316; *Collins v. Potts*, 9 Ky. L. Rep. 536. And where the direction is made part of the verdict and embodied in the bill. *Rosenthal v. Vernon*, 79 Wis. 245, 48 N. W. 485.

And refusal to direct a verdict will be reviewed by the general term of the New York supreme court, though no exception was saved. *Benson v. Gerlach*, 51 Hun, 640, 4 N. Y. Supp. 273. But not on an appeal from the New York city court to the general term of the common pleas. *Paige v. Chedsey*, 4 Misc. 183, 23 N. Y. Supp. 879; *Eckensberger v. Amend*, 10 Misc. 145, 30 N. Y. Supp. 915.

And where a verdict has been ordered, subject to the opinion of the court at general term, an exception is not necessary to obtain a review of the determination of a question of law arising upon the verdict so ordered. *Duryea v. Vosburgh*, 121 N. Y. 57, 24 N. E. 309.

So, plaintiff in a case in which exceptions were ordered to the appellate division, who asked leave to submit further evidence on an intimation of an intention to nonsuit him and to allow an exception, is entitled to have the appellate court treat the case as though an exception were taken, though no formal exception was taken when the nonsuit was actually granted. *Dcane v. Buffalo*, 42 App. Div. 205, 58 N. Y. Supp. 810.

**Taylor v. Switzer*, 110 Mo. 410, 19 S. W. 735; *Bondz v. Pennsylvania Co.* 138 Pa. 153, 20 Atl. 871; *Anderson v. Oliver*, 138 Pa. 156, 20 Atl. 981; *Harvey v. Pollock*, 148 Pa. 534, 23 Atl. 1127; *Pollock v. Harvey*, 148 Pa. 536, 23 Atl. 1128; *Finch v. Conrade*, 154 Pa. 326, 26 Atl. 368; *Miller v. Balfour*, 138 Pa. 183, 22 Atl. 86.

12. By whom exceptions to be taken.

An exception to be available must be taken by the party¹ who seeks to have reviewed the ruling or instruction complained of.²

And a joint exception taken by two or more parties is unavailing unless well taken as to all.³

¹It must be taken by a party to the suit. *Conrad v. Johnson*, 20 Ind. 421; *Campbell v. Swasey*, 12 Ind. 70.

So, an exception taken by an attorney as *amicus curiæ* will not be noticed. *Birmingham Loan & Auction Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945; *Conrad v. Johnson*, 20 Ind. 421; *Knight v. Low*, 15 Ind. 374; *Martin v. Tapley*, 119 Mass. 116.

But an exception taken by the real party interested in the appeal, though not the nominal appellant, is sufficient. *Fries v. Porch*, 49 Iowa, 351.

²The rule is that an exception taken by one party is not available to his adversary. *Chicago & A. R. Co. v. Heinrich*, 57 Ill. App. 399; *Bingham v. Stage*, 123 Ind. 281, 23 N. E. 756. But that it must be taken by the party claiming to be injured. *Coates v. Wilkes*, 94 N. C. 174.

But in *Grand Rapids v. Perkins*, 78 Mich. 93, 43 N. W. 1037, it is held that the fact that the objection and exception taken to a charge were not taken by the counsel representing the appellant will not prevent him from availing himself of them.

And in *Duflo v. Juif*, 63 Mich. 513, 30 N. W. 105, it is held that, although it is not strictly for the court to determine whether an exception should be noted, if the party sees fit to accept the judge's action, it is sufficient.

³*Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990; *Schoonmaker v. Bonnie*, 119 N. Y. 565, 23 N. E. 1106; *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077; *Markham v. Washburn*, 45 N. Y. S. R. 683, 18 N. Y. Supp. 355. Especially where the one as to whom the ruling was incorrect made no request that its effect be limited by appropriate instructions. *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077.

13. When to be taken.

And to secure the right of review, an exception must be taken at the time when the ruling¹ or instruction² objected to is given; and should be then noted;³ but if seasonably taken the judge may allow it to be noted before the verdict,⁴ but not after verdict.⁵

¹*Turner v. Yates*, 16 How. 14, 29, 14 L. ed. 824, 831; *Hanna v. Maas*, 122 U. S. 24, 30 L. ed. 1117, 7 Sup. Ct. Rep. 1055; *Lester v. Georgia, C. & N. R. Co.* 90 Ga. 802, 17 S. E. 113; *Horne v. Guiser Mfg. Co.* 74 Ga. 790; *Matsinger v. Fort*, 118 Ind. 107, 20 N. E. 653; *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. 754; *Cobb v. Stewart*, 4 Met. (Ky.) 255, 83 Am. Dec. 465; *Lee Gin & Mach. Co. v. Duncan*, 1 Miss. Dec. No. 18, 159, 23 So. 1018; *Ecton v. Kansas City, O. & S. R. Co.* 56 Mo. App. 337; *Allen v. Sallinger*, 108 N. C. 159, 12 S. E. 896; *Stewart v. Huntington Bank*, 11 Serg. & R. 267, 14 Am. Dec. 628; *Stedham v. Creighton*, 28 S. C. 609. 9

S. C. 465; *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404. See also note to *Missouri v. Hope* (Mo.) 8 L. R. A. 608.

So, of exceptions to the improper conduct or remarks of the trial judge. *Yunker v. Marshall*, 65 Ill. App. 667; *Mulliner v. Bronson*, 114 Ill. 510, 2 N. E. 671. Or of counsel. *Chandler v. Thompson*, 30 Fed. Rep. 38; *Hoyt v. Carpenter*, 6 Kan. App. 305, 51 Pac. 71; *Kennedy v. Holladay*, 25 Mo. App. 503. The improper restriction of the number of witnesses on any one point. *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174. The improper admission or rejection of evidence. *Watson v. LaGrand Roller Skating Rink Co.* 177 Ill. 203, 52 N. E. 317; *Brown v. Kolb*, 8 Pa. Super. Ct. 413; *Feidler v. Motz*, 42 Kan. 519, 22 Pac. 561; *McPhee v. Sullivan*, 77 Wis. 33, 45 N. W. 808; *Hangen v. Hachemeister*, 24 N. Y. S. R. 526, 21 N. E. 1046.

In *McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344, it is held that, though the record fail to show a prompt exception to certain rulings complained of, by the use of such phrases as "then and there," "at the moment," "immediately," or words of like import, it is sufficient if the record does show that the questions ruled on were raised one after the other on the same day, and that after the ruling on each question an exception was taken.

And in *Laird v. Upton*, 8 N. M. 409, 45 Pac. 1010, the words "during the progress of a trial," in a statute requiring exceptions to decision of the court on any matter of law arising during the progress of a trial to be taken at the time of the decision, were held to mean during the steps taken from the beginning of the trial to its final disposition in the trial court, including a motion in arrest and a motion for a new trial.

In West Virginia, an exception to a ruling of the court upon the trial may be taken at any time before the retirement of the jury. *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566; *Greenbrier Industrial Exposition v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78.

**Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. ed. 550; *Holmes v. Montauk S. B. Co.* 93 Fed. Rep. 731, 35 C. C. A. 556. But it is too late after part of the jury have retired. *Spooner v. Handley*, 151 Mass. 313, 23 N. E. 840.

So, of failure to charge on a special point, or refusal to give a requested charge. *Thrasher v. Postel*, 79 Wis. 503, 48 N. W. 660.

And in *Fire Asso. of Phila. v. Ruby*, 58 Neb. 730, 79 N. W. 723, reversal on the ground of omission to file the instructions with the clerk before they were read to the jury was refused because no exception was taken on the ground before they were read.

In some of the states, an exception is not necessary to have a review of the action of the trial court as to instructions. For cases, see *supra*, § 9.

*An exception to a ruling on a question of evidence must be taken and reduced to writing, or entered in the minutes at the time the ruling is made; but an exception to a charge given to the jury must be taken before verdict. N. Y. Code Civ. Proc. § 995. And see *Rubenfeld v. Rabiner*, 33 App. Div. 374, 54 N. Y. Supp. 68, where an exception to order directing a verdict, taken after the discharge of the jury, was held to have been taken too late.

And § 724, providing for relief from a judgment order or other proceeding taken against one through his mistake, inadvertence, or excusable neglect, and for supplying omissions from any proceedings, cannot be invoked for the purpose of supplying exceptions *nunc pro tunc* claimed to have been omitted through inadvertence and mistake. *Fifth Avenue Bank v. Parker*, 15 N. Y. Supp. 734.

**Hunnicut v. Peyton*, 102 U. S. 333, 354, 26 L. ed. 113, 116; *Gibson v. Eckeridge*, 90 Va. 696, 19 S. E. 785.

A practice of the trial court, not embodied in a rule, permitting exceptions to be taken after the close of the trial, and included in the bill of exceptions as if taken in proper time, does not obviate the necessity of a timely exception at the trial and before verdict. *Johnson v. Garber*, 73 Fed. Rep. 523, 43 U. S. App. 107, 19 C. C. A. 556.

**United States v. Carey*, 110 U. S. 51, 28 L. ed. 67, 3 Sup. Ct. Rep. 424; *Renfro v. Wynne*, 74 Ga. 406; *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Oakley v. Van Noppen*, 95 N. C. 60; *Virgin Cotton Mills v. Alernathy*, 115 N. C. 402, 20 S. E. 522.

So, an exception appearing only in the statement of facts filed after adjournment for the term will not be noticed. *Mallory v. Smith*, 76 Tex. 262, 13 S. W. 199. So, also, of one raised for the first time on the motion for a new trial. *Garner v. State*, 31 Fla. 170, 12 So. 638; *Barker v. Todd*, 37 Minn. 370, 34 N. W. 895. Or for the first time on appeal. *Knight v. Chicago, R. I. & P. R. Co.* 81 Iowa, 310, 46 N. W. 1112; *Smith v. Pearson*, 44 Minn. 397, 46 N. W. 849; *McGraw v. Franklin*, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810.

In Iowa, an exception to a ruling or decision must be taken at the time it is made. *Nagel v. Guittar*, 62 Iowa, 510, 17 N. W. 671. But an exception to instructions need not be taken at the time, but may be at any time within three days after verdict. *Watson v. Stotts*, 68 Iowa, 659, 27 N. W. 813. They may be taken on the motion for a new trial, if made within the time limited. *Deere v. Needles*, 65 Iowa, 101, 21 N. W. 203; *Rowen v. Sommers*, 101 Iowa, 735, 66 N. W. 897. But extending the time in which to file such motion does not extend the time in which to file exceptions. *Leach v. Hill*, 97 Iowa, 81, 66 N. W. 69.

In North Carolina an exception to a charge or refusal to charge may be first taken in the appellant's statement of case on appeal; but exceptions as to all other matters must be taken at the time. *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175; *Marriner v. John L. Roper Lumber Co.* 113 N. C. 52, 18 S. E. 94; *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113. But exceptions to a charge, filed after settlement of the case on appeal, are too late,—especially where no extension of time in which to file them is shown by the record or in writing, and appellant's claim of consent is denied by appellee. *Hemphill v. Morrison*, 112 N. C. 756, 17 S. E. 535.

14. Sufficiency—form of exception.

No particular form in alleging and saving exceptions is required; if the court understands that counsel except to a ruling or refusal to rule, instructions given or refusal to instruct, it is sufficient.¹ And the actual use of the word "exception" is not always necessary to show

that one was duly taken;² nor on the other hand does its use always indicate that an exception was taken.³

¹*Leavenworth v. Lafayette Mills*, 6 Kan. 288; *Thwing v. Clifford*, 136 Mass. 482. And that they intend not to abide the ruling. *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737.

The danger in not taking an exception expressly and formally is that the judge may not understand that counsel intend to except, and thus the exception may be lost. So an exception to an order denying a motion for a new trial asked on the ground that certain findings of law are against the law of the land and against the evidence sufficiently saves the question of law for review, though no formal or technical exceptions were saved to the findings themselves. *Leavenworth v. Lafayette Mills*, 6 Kan. 288.

But merely handing to the judge a written request for instructions does not necessarily imply that, if it is not granted, an exception is saved; if the party intends to except to the charge given, as not conforming to his request, it is his duty to allege exceptions in such form that the judge may understand them to be intended as such. *Leyland v. Pingree*, 134 Mass. 367.

So, also, merely objecting to the admission of evidence, the record not showing a specific exception to the ruling on the objection, is insufficient. *Crabtree v. Vanhoozier*, 53 Mo. App. 405.

And simply praying an appeal is not equivalent to an exception to the ruling of the trial court assigned as error so as to dispense with the necessary statutory exception to such ruling. *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896.

And an exception taken in the form of an argument will not be noticed. *Hall v. Hall*, 45 S. C. 33, 22 S. E. 777.

But an oral exception to an order or decision is sufficient if entered of record and the grounds appear in the entry at the end of the decision. *Cramer v. White*, 29 Iowa, 336.

In Washington, exceptions to rulings need not be noted in the journal of the trial court or come up to the appellate court in the form of journal entries. *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Terr. 250, 13 Pac. 710.

²Thus, a recital in the bill of exceptions, that to the "action of the court in giving said instruction, defendant then and there objected", is sufficient to show that an exception was reserved to such instruction. *Elsner v. Supreme Lodge, K. & L. of H.* 98 Mo. 640, 11 S. W. 991.

So, a statement of the court, in ruling on evidence, that certain testimony was, under objection, subject to the competency of the witness, sufficiently shows that effectual objections and sufficient exceptions were, at some time during the trial, taken to its admission. *Whitney v. Traynor*, 74 Wis. 289, 42 N. W. 267.

And an objection to the exclusion of testimony on the ground of the witness's incompetency, based on a suggestion to the court that there is no evidence of such incompetency, is a proper mode of reserving an exception to the court's ruling. *Cromwell v. Horton*, 94 Ala. 647, 10 So. 358.

³Thus, counsel's statements, "I except to that statement," "I take exception

to that statement," "I except," or statements by the court "let exception be noted," "note the exception," made during counsel's argument to the jury, are not sufficient to present for review the arguments complained of, unless taken to an adverse ruling on previous objections properly raised. *Marder v. Leary*, 137 Ill. 319, 26 N. E. 1093; *North Chicago Street R. Co. v. Southwick*, 165 Ill. 494, 46 N. E. 377.

As to the necessity of an objection preceeding the exception, see *supra*, § 1, note 2; and for the necessity generally of objections, see *ante*, Division IX., *Offers of Evidence and Objections*.

15. — anticipatory note of intended exception.

A previous reservation of the right to except subsequently is not a sufficient exception.¹

¹*Gregory v. Dodge*, 14 Wend. 593, Affirming 4 Paige, 557.

16. — stipulations as to exceptions.

A stipulation of counsel, or a direction by the trial judge to which there is no dissent, that the stenographer should enter an exception to whatever there should be an objection to, does not make a subsequent objection equivalent to an exception; but will entitle an objecting party to have an exception inserted on the settlement of the case.¹

Nor is a stipulation that it is understood that an exception follows every objection on the trial,² or that a general exception shall serve as a particular exception to each objection,³ available as an exception.

¹*Stephens v. Reynolds*, 6 N. Y. 454; *Briggs v. Waldron*, 83 N. Y. 582. Contra, *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825. And by statute in some states. Sand. & H. Ark. Dig. § 5845. And see other codes and statutes.

²*Greer v. Greer*, 58 Hun, 251, 12 N. Y. Supp. 778.

³*Pecple v. Buddensieck*, 103 N. Y. 501, 57 Am. Rep. 766, 9 N. E. 44.

17. — particularity and definiteness; in general.

Exceptions to be of any avail must present specifically the ruling or instruction objected to;¹ an exception to one ruling will not avail to bring up for review another.²

¹*Springfield F. & M. Ins. Co. v. Sca*, 21 Wall. 162, 22 L. ed. 513; *Suttles v. Smith*, 75 Ga. 830; *Central R. Co. v. Freeman*, 75 Ga. 331; *Cureton v. Westfield*, 24 S. C. 457; *Lewis v. New York, L. E. & W. R. Co.* 123 N. Y. 496, 26 N. E. 357; *Butler v. Oswego*, 56 Hun, 358, 10 N. Y. Supp. 768. And see note to *State v. Hope* (Mo.) 8 L. R. A. 608.

²*Springer Lithographing Co. v. Falk*, 20 U. S. App. 296, 59 Fed. Rep. 707, 8 C. C. A. 224; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 26 Pac. 774; *East St. Louis Electric R. Co. v. Stout*, 150 Ill. 9, 36 N. E. 963; *Burke v. Ward*, 50 Ill. App. 283; *State ex rel. Roe v. Weaver*, 123 Ind. 512, 24 N. E. 330; *Westlake v. Muscatine*, 85 Iowa, 119, 52 N. W. 117; *State ex*

rel. *Smith v. Eighteenth District Court Judge*, 38 La. Ann. 920; *Herman v. Jeffries*, 4 Mont. 513, 1 Pac. 11; *Schoonmaker v. Bonnie*, 119 N. Y. 565, 23 N. E. 1106; *King v. Buffalo*, 57 Hun, 586, 10 N. Y. Supp. 564; *Overseers of Poor v. Overseers of Poor (Pa.)* 5 Cent. Rep. 712; *Schoonover v. Condon*, 12 Wash. 475, 41 Pac. 195.

Contra, of a question necessarily involved in the one duly excepted to. *Re Parker*, 55 Hun, 604, 8 N. Y. Supp. 394. So where the court directs a verdict, an exception to the court's ruling thereon, in the absence of anything from which it may be implied that the right to go to the jury has been waived, is sufficient to present the objection on appeal that there were questions of fact for the jury, though there was no exception to his previous denial to go to the jury. *Kumberger v. Congress Spring Co.* 158 N. Y. 339, 53 N. E. 3. And so, even though there was no specific request that each fact be submitted and an exception saved to the ruling thereon. *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301. And when a motion to dismiss the complaint and a motion to go to the jury are substantially simultaneous, an exception to a denial of the latter motion is equivalent to an exception to the granting of the motion to dismiss. *Smith v. Stephens*, 47 Hun, 318.

8. — — exceptions in gross.

So, a general exception directed to several rulings or instructions, or to a charge involving more than a single proposition, is not available if any one of the rulings, instructions, or propositions is correct;¹ but each ruling sought to be reviewed must be presented on a timely exception.²

¹*Whyte v. Rosencrantz*, 123 Cal. 634, 56 Pac. 436; *Gray v. Elzroth*, 10 Ind. App. 587, 37 N. E. 551; *Elton v. Markham*, 20 Barb. 343; *Jones v. Osgood*, 6 N. Y. 233; *Cronk v. Canfield*, 31 Barb. 171; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573; *Neeley v. Democratic Pub. Co.* 12 Wash. 659, 41 Pac. 173.

Contra, if the rulings as a whole embrace but a single proposition of law. *Henkle v. Keota*, 68 Iowa, 334, 27 N. W. 250.

²*East St. Louis Electric Street R. Co. v. Cauley*, 148 Ill. 490, 36 N. E. 106; *Walter v. Walter*, 117 Ind. 247, 20 N. E. 148; *Kleinschmidt v. Iler*, 6 Mont. 122, 9 Pac. 901; *Bosley v. National Mach. Co.* 123 N. Y. 554, 25 N. E. 990; *Meekins v. Tatem*, 79 N. C. 546; *Murray v. Murray*, 6 Or. 17; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Carroll v. Little*, 73 Wis. 52, 40 N. W. 582.

And so taken that there shall be no doubt as to the specific ruling sought to be reserved for review, and no necessity to hunt for it during the progress of the cause. *Kimball v. Carter*, 95 Va. 77, 38 L. R. A. 570, 27 S. E. 823; *Carroll v. Little*, 73 Wis. 52, 40 N. W. 582.

9. — — evidence.

Whether or not evidence was improperly admitted or excluded will not be determined on an appellate review, unless the exception specifically points out the evidence considered objectionable,¹ or shows what the evidence offered and rejected was.²

Nor can the correctness of a ruling on a motion to strike out evidence be reviewed if the exception fails to point out the evidence in question and its objectionable features.³

¹*Birmingham v. Pettit*, 21 D. C. 209; *Weston v. Moody*, 29 Fla. 169, 10 So. 612; *Minter v. State*, 104 Ga. 743, 30 S. E. 989; *Trucker v. Burditt*, 49 Ill. App. 278; *Louisville & N. R. Co. v. Montgomery*, 17 Ky. L. Rep. 807, 32 S. W. 738; *French v. Day*, 89 Me. 441, 36 Atl. 909; *Wiley v. Logan*, 95 N. C. 358; *Howard v. Quattlebaum*, 46 S. C. 95, 24 S. E. 93. And see note to *Shinners v. Proprietors of Locks & Canals* (Mass.) 12 L. R. A. 554.

It should be so pointed out as not to subject the court to unnecessary labor and danger of mistakes by being required to search through the record for it. *Kimball v. Carter*, 95 Va. 77, 28 L. R. A. 570, 27 S. E. 823.

Thus, a mere reference to the evidence as being found upon certain designated pages is insufficient. *White v. Moss*, 92 Ga. 244, 18 S. E. 13.

And upon a general exception to evidence, partly admissible and partly inadmissible, the court is not bound to separate the legal and the illegal portions. *Lowe v. State*, 88 Ala. 8, 7 So. 97.

So, an exception to a question put to a witness must state the name of the witness. *Freney v. Freney*, 80 Md. 406, 31 Atl. 304. And what his answer was. *Baltimore & F. T. Turnp. Co. v. Hebb*, 88 Md. 132, 40 Atl. 879; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1025. And that it was unfavorable to the exceptant. *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749.

And, according to *Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. 793, and *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488, to reserve an available exception to the exclusion of testimony, a proper question must be asked, and, on objection thereto, an offer made, stating the testimony the witness will give if permitted to answer, and an exception taken to the exclusion of the evidence as shown by the question and offer.

²*Dunton v. Keel*, 95 Ala. 159, 10 So. 333; *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *DeGraffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560; *Hirsch v. J. I. Case Threshing Mach. Co.* 85 Iowa, 451, 52 N. W. 363; *Gay v. Tower*, 173 Mass. 385, 53 N. E. 999; *Phœnix Ins. Co. v. Padgitt* (Tex. Civ. App.) 42 S. W. 800; *Miller v. State*, 28 Tex. App. 445, 13 S. W. 646. And its materiality. *Pennsylvania Co. v. Neumeyer*, 129 Ind. 401, 28 N. E. 860; *Meyers v. Cohn*, 4 Misc. 185, 23 N. Y. Supp. 996. And see note to *Shinners v. Proprietors of Locks & Canals* (Mass.) 12 L. R. A. 554.

So, an exception to rejection of a question proposed to be put to a witness must set out the question (*Masons' Union L. Ins. Asso. v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Gipe v. Cummins*, 116 Ind. 511, 19 N. E. 466; *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664; *Swearingen v. Hartford Ins. Co.* 52 S. C. 309, 29 S. E. 722), the answer expected (*Tolbert v. State*, 87 Ala. 27, 6 So. 284; *Sullivan County Comrs. v. Arnett*, 116 Ind. 438, 19 N. E. 299; *Paddleford v. Cook*, 74 Iowa, 433, 38 N. W. 137; *Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8; *Smethurst*

v. Proprietors of Independent Cong. Church, 148 Mass. 261, 2 L. R. A. 695, 19 N. E. 387; *Peterson v. Mille Lacs Lumber Co.* 51 Minn. 90, 52 N. W. 1082; *Sellars v. Foster*, 27 Neb. 118, 42 N. W. 907; *Herring v. Mason*, 17 Tex. Civ. App. 559, 43 S. W. 797; *McAuley v. Harris*, 71 Tex. 631, 9 S. W. 679; *Westcott v. Westcott*, 69 Vt. 234, 39 Atl. 199), and show that the answer would have been favorable (*Tolson v. Inland & S. Coast-ing Co.* 6 Mackey, 39; *Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8).

¹*Lippitt v. St. Louis Dressed Beef & Provision Co.* 27 Misc. 222, 57 N. Y. Supp. 747.

And an exception to a ruling on a motion to strike out evidence, part of which is legal and part illegal, is unavailing, if it includes both the legal and illegal. *Henry v. Hall*, 106 Ala. 84, 17 So. 187; *Kahn v. New York Elev. R. Co.* 7 Misc. 53, 27 N. Y. Supp. 339.

20. — — instructions and charges.

A general exception to a charge, not directed to the portion objected to as incorrectly stating the law, but directed to the charge as a whole, is unavailing,¹ unless the charge contains but a single proposition,² or unless it is erroneous as a whole.³

And a general exception to a charge containing two or more independent and distinct propositions, or an exception in gross to several instructions, will not be noticed if any one of them is correct.⁴

And an exception to a portion of a charge⁵ containing several propositions is insufficient if any of the propositions are correct.⁶

So, an exception to one instruction is not available to bring up for review another instruction not excepted to.⁷

But in taking an exception to the charge of the court on a particular proposition it is not necessary to segregate the remarks of the court on that exception from all other portions of the charge and object to the very words of the judge; it is sufficient if the proposition complained of and the ground of complaint are clearly called to the attention of the court.⁸

¹*Brown v. Kentfield*, 50 Cal. 129; *Rogers v. Rogers*, 74 Ga. 598; *Haskins v. Haskins*, 67 Ill. 446; *Hunting v. Downer*, 151 Mass. 275, 23 N. E. 832; *Rheiner v. Stillwater Street R. & Transfer Co.* 31 Minn. 193, 17 N. W. 279; *Booth v. Suezey*, 8 N. Y. 276; *Hemphill v. Morrison*, 112 N. C. 756, 17 S. E. 535; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209; *Bauskett v. Keitt*, 22 S. C. 200; *Brigham City v. Crawford* (Utah) 57 Pac. 842; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664.

²Thus, a general exception to the charge as given is too indefinite. *Pearce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399; *Marks v. Thompkins*, 7 Utah, 421, 27 Pac. 6. Or to each part of a charge. *Potter v. Seymour*, 4 Bosw. 140; *Nevins v. Bay State S. B. Co.* 4 Bosw. 225. Or to the charge of the court as given, and to each and every part thereof. *McAllister v. Engle*, 52 Mich. 56, 17 N. W. 694. Or to the

charge and to each and every part and to the whole thereof. *Yates v. Bachley*, 33 Wis. 185. Or to so much of the "following charge" as is set forth in a statement containing many independent propositions. *Bouck v. Enos*, 61 Wis. 660, 21 N. W. 825. Or to the last half of the charge. *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478. And an exception to a charge covering several pages, as follows: At the conclusion of the charge, counsel called the attention of the court to those portions of the charge inclosed in brackets, and, after having the same read to the court by the reporter, thereupon stated that he excepted to all of said portions so read, and to which the attention of the court was so called, and to the whole and to each and every part thereof,—presenting nothing for review. *Tucker v. Salem Flouring Mills Co.* 15 Or. 581, 16 Pac. 426.

**Eddy v. Howard*, 23 Iowa, 175; *Requa v. Holmes*, 16 N. Y. 193; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295. So of a charge which is not a portion of the main charge but stands in the record disconnected from and independent of it. *Smith v. Matthews*, 9 Misc. 427, 29 N. Y. Supp. 1058.

**Memphis & C. R. Co. v. Reeves*, 10 Wall. 189, 19 L. ed. 912; *May v. Gamble*, 14 Fla. 467; *Snyder v. Viola Min. & Smelting Co.* 2 Idaho, 771, 26 Pac. 127; *Hentig v. Kansas Loan & T. Co.* 28 Kan. 617; *Redman v. Voss*, 46 Neb. 512, 64 N. W. 1094; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.

**Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Anthony v. Louisville & N. R. Co.* 132 U. S. 172, 33 L. ed. 301, 10 Sup. Ct. Rep. 53; *Stevenson v. Moody*, 83 Ala. 418, 3 So. 695; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318; *Cavallaro v. Texas & P. R. Co.* 110 Cal. 348, 42 Pac. 918; *Wooton v. Seigel*, 5 Colo. 424; *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432; *Kelly v. John*, 13 Ind. App. 579, 41 N. E. 1069; *Reeves Bros. v. Harrington*, 85 Iowa, 741, 52 N. W. 517; *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 679; *State v. Flaherty* (Me.) 2 New Eng. Rep. 699; *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758; *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. 128; 24 Neb. 300, 38 N. W. 780; *Reynolds v. Boston & M. R. Co.* 43 N. H. 580; *Probst v. Domestic Missions of General Assembly*, 3 N. M. 373, 5 Pac. 702; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194. See also *Lichty v. Tannatt*, 11 Wash. 37, 39 Pac. 260, where it is said that a more liberal rule should perhaps be applied as to oral instructions; the court holding, however, that a general exception to the whole of the instructions, but particularly mentioning portions thereof, will be available only as to those portions particularly mentioned. But see *McCosker v. Banks*, 84 Md. 292, 35 Atl. 935, where it is held that the action of the court on several prayers for instructions made at the same time is but a single decision, a general exception to which is sufficient.

Illustrations of insufficient exceptions within the above rule:—To each and every part of the charge. *Caldwell v. Murphy*, 11 N. Y. 416; *Shull v. Raymond*, 23 Minn. 66. To all and each part of the foregoing charge and instructions. *Block v. Darling*, 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. Rep. 832. To each of the charges made by the

court at plaintiff's request. *Piper v. New York C. & H. R. R. Co.* 89 Hun, 75, 34 N. Y. Supp. 1072. To each of the instructions given to the jury respectively. *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723. To every line, sentence, and paragraph of the charge. *Danielson v. Dyckman*, 26 Mich. 169. To each paragraph of the charge. *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481. An exception severally and separately to each and every section and each and every paragraph of said charge as given. *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. 46. To the charge and each and every part thereof. *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Luedtke v. Jeffery*. 89 Wis. 136, 61 N. W. 292. Contra, *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599. To the giving of said charge and such several propositions of law therein contained. *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991. To the giving of which and to the giving of each part thereof. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837. To which charge and each and every part of it defendant excepted. *Mayberry v. Leech*, 58 Ala. 339. To the whole of the charge and to each part of it. *Jones v. Osgood*, 6 N. Y. 233. To the whole charge and every part thereof. *Nichols & S. Co. v. Chase*, 103 Wis. 570, 79 N. W. 772. To an entire charge or to all the instructions not included in brackets. *Crosby v. Maine C. R. Co.* 69 Me. 418. To the charge in its entirety and to the following portions thereof, followed by several propositions embracing substantially the same charge. *Vider v. O'Brien*, 18 U. S. App. 711, 62 Fed. Rep. 326, 10 C. C. A. 385. To said oral instructions and each and every part thereof by the court. *Moore v. Moore* (Cal.) 34 Pac. 90. An exception in the abstract at the close of the instructions, to all of which the plaintiff "then and there" excepted. *Hallenbeck v. Garst*, 96 Iowa, 509, 65 N. W. 417.

But in *Phœnix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108, an exception following several charges given and expressed thus: "The defendant excepted and now excepts to each one of these charges as given,"—was held a sufficient reservation of a separate exception to each.

And where instructions are in separate paragraphs and numbered, an exception to the instructions and to each and every of them then and there duly taken, is sufficient. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384. So, too, is an exception to the giving of each of such instructions duly and severally taken at the close of all the instructions, which had been preceded by the specific exception to the instruction objected to, sufficient to bring it up for review. *Bradbury v. Alden*, 13 Colo. App. 208, 57 Pac. 490. And in *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231, an exception to so much of the charge as related to counsel's contention, which was substantially incorporated therein, was held sufficient.

*The rule that exceptions should not be based upon mere extracts from the judge's charge, in which no distinct legal proposition is stated, does not apply where the judge, in his charge, has stated a distinct and separate legal proposition as applicable to the case. *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 31 S. E. 334.

**Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Hughes v. Heyman*, 4 App. D. C. 444; *Small v. Williams*, 87 Ga. 681, 13 S. E. 589; *Main v. Oien*, 47 Minn. 89, 49 N. W. 523; *Detroit Water Comrs. v. Burr*, 3 Jones & S. 523;

Dickerman v. Quincy Mut. F. Ins. Co. 67 Vt. 609, 32 Atl. 489; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468.

According to *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644, the rule is that a general exception to an extract from the charge makes the simple question whether the whole extract is erroneous, and, unless the whole of it be illegal, the exception must specifically point out the illegal part; otherwise, it cannot be ascertained whether the party is complaining of the part that is sound, or of that which is erroneous.

To raise the question of the use of a particular word by the trial judge in charging the jury, exception must be made to the word specifically, and not to the portion of the charge in which it appears. *National Cash-Register Co. v. Leland*, 94 Fed. Rep. 502, 37 C. C. A. 372.

Ryall v. Central P. R. Co. 76 Cal. 474, 18 Pac. 430; *Varnum v. Taylor*, 10 Bosw. 148.

What Cheer Coal Co. v. Johnson, 12 U. S. App. 490, 56 Fed. Rep. 810, 6 C. C. A. 148.

21. — — refusal or failure to instruct.

So, a general exception to a refusal or failure to give several requested instructions or to charge several propositions is insufficient,¹ unless all of the instructions or charges were proper and should have been given² unless otherwise expressly provided by statute or rule of court.³

¹*Fleming v. Latham*, 48 Kan. 773, 30 Pac. 166; *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 So. 856; *Edgell v. Francis*, 86 Mich. 232, 48 N. W. 1095; *Carroll v. Williston*, 44 Minn. 287, 46 N. W. 352; *Newall v. Bartlett*, 114 N. Y. 399, 21 N. E. 990.

Thus, an exception to so much of the charge as is variant from the request is insufficient. *Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797. So, also, is an exception to the refusal and charge of the court. *Jones v. East Tennessee, V. & G. R. Co.* 157 U. S. 682, 39 L. ed. 856, 15 Sup. Ct. Rep. 719.

And an exception to a refusal to charge as requested and to the charge as given, is too general. *Copp v. Hollins*, 56 Hun, 640, 9 N. Y. Supp. 57; *Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720. Especially where some of the requests were given as requested, others modified, and some refused. *Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 130, 23 N. E. 468. But *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36, treated an exception to rulings on requests as made as saving to the exceptant exceptions to rulings at variance with those requested and to which the attention of the judge was specifically directed by request to rule. And *Hayes v. Bush & D. Mfg. Co.* 102 N. Y. 648, 5 N. E. 784, holds that a single exception to refusal to charge as requested and to the court's charging to the contrary is not open to the objection that it is a single exception to two propositions.

So, a statement by the judge that it is understood that every omission and modification of requests is deemed excepted to by each counsel, is insufficient, where the record shows no omissions or modifications. *Gray*

v. Eschen, 125 Cal. 1, 57 Pac. 664. But *Weber v. Kansas City Cable R. Co.* 100 Mo. 205, 7 L. R. A. 822, 13 S. W. 587, holds that a statement in the bill that, to the refusal to give certain numbered requested instructions, counsel then and there excepted at the time, is not a general exception to the refusal of the instruction as a whole.

Teague v. Lindsey, 106 Ala. 266, 17 So. 538; *Ingalls v. Oberg*, 70 Minn. 102, 72 N. W. 841; *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Marks v. Tompkins*, 7 Utah, 421, 27 Pac. 6; *Gross v. Hays*, 73 Tex. 515, 11 S. W. 523.

So, a general exception to matter superadded to a requested charge given is unavailing if any part of it is correct. *Verdery v. Savannah, F. & W. R. Co.* 82 Ga. 685, 9 S. E. 1133.

On a general exception to the refusal of several instructions the appellate review is confined to the question whether some one of them was incorrect and therefore properly refused. *Yager v. McCormack*, 41 Fla. —, 25 So. 883.

But, though an exception be irregularly taken, the question sought to be raised and reviewed may be reviewed if all the parties understood what it was, and the judge was satisfied with the exceptions as presented to him. *National Cash-Register Co. v. Leland*, 94 Fed. Rep. 502, 37 C. A. 372.

¹Thus, in Alabama, where an exception to a ruling of the court giving or refusing an instruction requested in writing need not be reserved. Code, § 613. And see *supra*, § 9, note 3. And in Iowa. See *White v. Elgin Creamery Co.* 108 Iowa, —, 79 N. W. 283.

See also note 3 to next succeeding section.

22. — — specifying error.

The grounds of the alleged error in the question sought to be reviewed must be presented in a direct and positive form;¹ and an exception taken on one ground will not support an assignment of error on another.²

So, the correctness of a ruling admitting or excluding evidence will not be considered unless the grounds of objection are made to appear in the exception³; nor will an objection on a ground not specified in the exception be noticed.⁴

And exceptions to charges and instructions⁵ or refusal or failure to charge as requested⁶ must point out with particularity the errors complained of, unless otherwise expressly provided by statute.⁷

And an exception assigning one ground of error is not available to question the correctness or sufficiency of a charge or instruction on another ground.⁸

¹*Guggenheim v. Kirchhofer*, 26 U. S. App. 664, 66 Fed. Rep. 755, 14 C. C. A. 72; *Heilbron v. Centerville & K. Irrig. Ditch Co.* 76 Cal. 8, 17 Pac. 932; *Georgia R. Co. v. Olds*, 77 Ga. 673; *Coble v. Eltzroth*, 125 Ind. 429,

25 N. E. 544; *Brantz v. Marcus*, 73 Iowa, 64, 35 N. W. 115; *Topeka Primary Asso. University of Builders v. Martin*, 39 Kan. 750, 18 Pac. 941; *Jones v. Worden*, 12 Ky. L. Rep. 105, 13 S. W. 911; *Warner v. Clark*, 45 La. Ann. 863, 21 L. R. A. 502, 13 So. 203; *Baltimore & O. R. Co. v. Mali*, 66 Md. 53, 5 Atl. 87; *Hooper v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 52, 33 N. W. 314; *Carr v. Moss*, 36 Mo. App. 565; *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751; *Kinsley v. Norris*, 61 N. H. 639; *Hunter v. Manhattan R. Co.* 141 N. Y. 281, 36 N. E. 400; *Warlick v. Lowman*, 104 N. C. 403, 10 S. E. 474; *Swift v. Mulkey*, 17 Or. 532, 21 Pac. 871; *McCullough v. Kervin*, 49 S. C. 445, 27 S. E. 456; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Buchanan v. Cook*, 70 Vt. 168, 40 Atl. 102; *Boburg v. Prahl*, 3 Wyo. 325, 23 Pac. 70.

But an exception that "the court below should have granted the nonsuit asked for by the defendant at the close of plaintiff's testimony, and it was error of law in him not to have done so," is not objectionable as an allegation of error by mere reference back. *Huggins v. Watford*, 38 S. C. 504, 17 S. E. 363.

**Gambrill v. Schooley*, 89 Md. 546, 43 Atl. 918; *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Lewis v. New York, L. E. & W. R. Co.* 123 N. Y. 496, 26 N. E. 357.

**Toplitz v. Hedden*, 146 U. S. 252, 36 L. ed. 961, 13 Sup. Ct. Rep. 70; *Larkin v. Baty*, 111 Ala. 303, 18 So. 666; *Oakes v. Miller*, 11 Colo. App. 374, 55 Pac. 193; *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Joliet v. Johnson*, 177 Ill. 178, 52 N. E. 498; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 662, 50 N. E. 877, 52 N. E. 399; *Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895; *Holman v. Union Street R. Co.* 114 Mich. 208, 72 N. W. 202; *Woodbury v. District of Columbia*, 5 Mackey, 127; *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565; *Brown v. Third Ave. R. Co.* 19 Misc. 504, 43 N. Y. Supp. 1094; *Saugerties Bank v. Mack*, 35 App. Div. 398, 54 N. Y. Supp. 950; *Tilley v. Bivens*, 110 N. C. 343, 14 S. E. 920; *Burton v. Severance*, 22 Or. 91, 29 Pac. 200; *Land Mortg. Invest. & Agency Co. v. Gillam*, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203; *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721; *Calhoun v. Quinn* (Tex. Civ. App.) 21 S. W. 705; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 255. Contra, of an exception to the exclusion of evidence. *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Crow v. Stevens*, 44 Mo. App. 137.

And the omission is not cured by a subsequent statement of the grounds to the assignment of errors. *North Chicago Street R. Co. v. St. John*, 57 U. S. App. 366, 85 Fed. Rep. 806, 29 C. C. A. 654.

But failure to so state the grounds of objection to either the admission or exclusion of evidence is of no moment if the evidence in question was in fact illegal. *Pittsburgh & W. R. Co. v. Thompson*, 54 U. S. App. 222, 82 Fed. Rep. 720, 27 C. C. A. 333; *McClellan v. State*, 117 Ala. 140, 23 So. 653; *Crow v. Stevens*, 44 Mo. App. 137; *Harcastle v. Heine*, 25 Misc. 146, 54 N. Y. Supp. 169; *Louisville & N. R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050. So, even though the objection stated be not put upon the proper ground. *Witherow v. Slayback*, 158 N. Y. 649, 53 N. E. 681.

And failure to state the grounds of the objection at the time of the ruling

is immaterial, if the court is in fact advised thereof when the evidence is offered. *Gray v. Brooklyn Union Pub. Co.* 35 App. Div. 286, 55 N. Y. Supp. 35.

But indefiniteness of an exception to the admission of evidence contained in the bill of exceptions containing the evidence is obviated by a sufficiently definite exception reserved by a special bill. *Starnes v. Allen*, 151 Ind. 108, 119, 45 N. E. 330, 51 N. E. 78.

**Tibbet v. Sue*, 125 Cal. 544, 58 Pac. 160; *Springfield v. McCarthy*, 79 Ill. App. 388; *Burdick v. Raymond*, 107 Iowa, 228, 77 N. W. 833; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Sloan v. Wherry Bros.* 51 Neb. 703, 71 N. W. 744; *Hunter v. Batterson*, 28 Misc. 479, 59 N. Y. Supp. 502; *Fort Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102. So of exceptions to depositions, except on the ground of incompetency of the witness. *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611.

**Hartranft v. Langfeld*, 125 U. S. 128, 31 L. ed. 672, 8 Sup. Ct. Rep. 732; *Frost v. Grizzly Bluff Creamery Co.* 102 Cal. 525, 36 Pac. 929; *Bell v. Sheridan*, 21 D. C. 370; *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644; *Young v. Youngman*, 45 Kan. 65, 25 Pac. 209; *Rock v. Indian Orchard Mills*, 142 Mass. 522, 8 N. E. 401; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438; *Serviss v. Stockstill* 30 Ohio St. 418; *Kearney v. Snodgrass*, 12 Or. 315, 7 Pac. 309; *Davis v. Elmore*, 40 S. C. 533, 19 S. E. 204; *Eddy v. Still*, 3 Tex. Civ. App. 346, 22 S. W. 525; *Goodwin v. Perkins*, 39 Vt. 598; *Hamlin v. Haight*, 32 Wis. 237; *Newton v. Whitney*, 77 Wis. 515, 46 N. W. 882.

Thus, a general exception will not raise the question of definiteness or completeness of the instruction. *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. And an exception based merely on error in the instructions is too vague. *Boggan v. Hone*, 97 N. C. 268, 2 S. E. 224. So, also, an exception for misdirection in the charge, without specifying any particulars, is too general. *Everett v. Williamson*. 107 N. C. 204, 12 S. E. 187. So also is an exception that the court erred in its general charge because it charged the law in the abstract and failed to apply it to the facts proved. *Holman v. Herscher* (Tex.) 16 S. W. 984. Or because a charge clearly indicates to the jury the judge's opinion on the facts of the case. *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956. Or because it is argumentative and does not present the appellant's claims as fully as those of his adversary. *Owen v. Brown*, 70 Vt. 521, 41 Atl. 1025. Or that it is not a correct statement of the law of the state as applied to the testimony in the case. *Disher v. South Carolina & G. R. Co.* 55 S. C. 187, 33 S. E. 172. Or that it does not cover the case made by the declaration and proof. *Whelan v. Georgia Midland & G. R. Co.* 84 Ga. 506, 10 S. E. 1091. Or that it misstates the testimony, without showing in what particular. *Keystone Lumber & Salt Mfg. Co. v. Dole*, 43 Mich. 370, 5 N. W. 412. Or that it states principles of law correct in an action between grantor and grantee, but incorrect in an action in which the issues of boundary and possession are raised by a stranger.

Connor v. Johnson, 53 S. C. 90, 30 S. E. 833. And if the absence of a qualifying word is the ground of error alleged, the exception should so specify. *Western Coal & Min. Co. v. Ingraham*, 36 U. S. App. 1, 70 Fed. Rep. 219, 17 C. C. A. 71.

**Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080. So, an exception assigning as error qualifications of requested charges, which it is claimed should have been given as requested, is too general. *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 31 S. 518, 13 S. E. 679; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956. Or that portions of the charges given were variant from the requests, without pointing out the variance. *Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439.

And where the court fails to write the word "given" on the margin as required by statute, the exception must be specifically taken on that ground. *Omaha & F. Land & T. Co. v. Hansen*, 32 Neb. 449, 49 N. W. 456.

**Sexton v. School Dist. No. 34*, 9 Wash. 5, 36 Pac. 1052.

So, in Montana, it is not necessary, in an exception to an instruction, to point out the particular error complained of, whether it be that the instruction is against the law or against the evidence. *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758.

And, in Iowa, exceptions to the giving or refusing of instructions may, under the express provision of the Code, be noted by the shorthand reporter, and no reason for such exception need be given. *White v. Elgin Creamery Co.* 108 Iowa, —, 79 N. W. 283. But the exception must be taken at the time; otherwise the grounds thereof must be stated. *Byford v. Girton*, 90 Iowa, 661, 57 N. W. 588; *Boyce v. Wabash R. Co.* 63 Iowa, 70, 50 Am. Rep. 730, 18 N. W. 673; *Hall v. Gibbs*, 43 Iowa, 380, 384.

In North Carolina an exception to a refusal to give specific instructions will be reviewed, although it specifies no particular error therein. See *Evcrett v. Williamson*, 107 N. C. 204, 12 S. E. 187, *dictum*.

**Walker v. Liddell*, 103 Ga. 574, 30 S. E. 294; *Carlson v. Dow*, 47 Minn. 335, 50 N. W. 232; *Ganaway v. Salt Lake Dramatic Asso.* 17 Utah, 37, 53 Pac. 830.

XII.—WITHDRAWING AND STRIKING OUT EVIDENCE.

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| 1. Withdrawing. | 5. Delay in moving. |
| 2. Moving to strike out—after omitting to object. | 6. Form of motion—specifying evidence. |
| 3. — after adversary's omission. | 7. — specifying grounds. |
| 4. — after unsuccessful objection. | 8. Power of the court. |

1. Withdrawing.

One who has adduced evidence against objection, by calling forth a responsive answer or by reading a document, has not a right to withdraw it or have it struck out;¹ but may be allowed in the discretion of the court, to withdraw it, although the other party has taken an exception,² provided that it be wholly harmless to the other party, and the latter be allowed to have the benefit of it, in his own favor, if he desire.

If it is, or may be, injurious to the party who has excepted, it cannot be withdrawn without his consent, for he has the right to meet it.³

¹*Decker v. Bryant*, 7 Barb. 182, 189; *Furst v. Second Ave. R. Co.* 72 N. Y. 542, 546.

²*State v. Towler*, 13 R. I. 661, and cases cited; *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713; *Providence L. Ins. & Invest. Co. v. Martin*, 32 Md. 310; *Fuller v. Jamestown Street R. Co.* 75 Hun, 273, 26 N. Y. Supp. 1078; *Kopetzky v. Metropolitan Elev. R. Co.* 14 Misc. 311, 35 N. Y. Supp. 766.

If the answer is not so irresponsive as to relieve the party eliciting it from the responsibility of it, and its legality is doubtful, he should disclaim it and decline to receive it. *O'Hagan v. Dillon*, 76 N. Y. 170.

Whether the withdrawal will cure the error is often another question.

³But one who has opposed its exclusion and objected to its withdrawal from the jury cannot complain of its admission, though he duly objected to it when offered and admitted. *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809.

2. Moving to strike out—after omitting to object.

A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it struck out,¹ but at most to have the jury instructed to disregard it.² The motion is, however, addressed to the discretion of the trial judge.³

But, although a question be proper and pertinent, if the answer be irresponsive and objectionable the remedy of the party aggrieved is to move that the objectionable part of the answer be stricken out, or to request that the jury be instructed to disregard it,⁴ before the case is submitted.⁵

And a party desiring the exclusion of evidence apparently legal when given, on the ground that it has since become illegal, should move to have it stricken out.⁶

¹*Payne v. Long* (Ala.) 25 So. 780; *Lissak v. Crocker Estates Co.* 119 Cal. 442, 51 Pac. 688; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Mabry v. State*, 71 Miss. 716, 14 So. 267; *Hickman v. Green*, 123 Mo. 165, 29 L. R. A. 39, 22 S. W. 455, 27 S. W. 440; *Brown v. Cleveland*, 44 Neb. 239, 62 N. W. 463; *Hoyt v. Hoyt*, 112 N. Y. 514, 20 N. E. 402; *Rodee v. Detroit F. & M. Ins. Co.* 74 Hun, 146, 26 N. Y. Supp. 242; *Re Morgan*, 104 N. Y. 74, 9 N. E. 861; *Dallmeyer v. Dallmeyer* (Pa.) 16 Atl. 72; *Ingram v. Sumter Music House*, 51 S. C. 281, 28 S. E. 936; *Way v. Johnson*, 5 S. D. 237, 58 N. W. 552; *Atchison, T. & S. F. R. Co. v. Bryan* (Tex. Civ. App.) 37 S. W. 234; *Weed v. St. Johnsbury & L. C. R. Co.* 66 Vt. 420, 29 Atl. 631; *Werner v. Ashland Lighting Co.* 84 Wis. 652, 54 N. W. 996.

Contra, *Bloun v. Beall*, 95 Ga. 182, 22 S. E. 52. Especially where the evidence is clearly irrelevant and hurtful. *Murray v. Silver City, D. & P. R. Co.* 3 N. M. 580, 9 Pac. 369.

The rule is one of practice, and is applied in order to save the time of the court, which otherwise would be uselessly consumed in listening to testimony and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation or belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

And the right to move to have testimony stricken out is waived by withdrawing the objection to the question put to the witness testifying. *Re Waa*, 106 Cal. 343, 39 Pac. 624. Or by proceeding, without objection or motion, to cross-examine the witness. *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328. So, also, it is too late to object to the evidence as being improperly admitted where cross-examination is proceeded with. *Hannum v. Powell*, 187 Pa. 292, 41 Atl. 29.

A motion to strike out the testimony of witnesses is not the proper remedy for their refusal to prepare tables required by counsel. *Northern P. R. Co. v. Keyes*, 91 Fed. Rep. 47.

²*Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 389; *Quin v. Lloyd*, 41 N. Y. 349, 355 (per

Woodruff, J., error to strike it out; but the better view is that it is discretionary; *Marks v. King*, 64 N. Y. 628, Affirming 1 Hun, 435; *Pontius v. People*, 82 N. Y. 339, Affirming 21 Hun, 328; *Woolsey v. Ellenville*, 155 N. Y. 573, 50 N. E. 270; *Holmes v. Moffat*, 120 N. Y. 159, 24 N. E. 275; *Brockett v. New Jersey S. B. Co.* 18 Fed. Rep. 157.

**De Forest v. United States*, 11 App. D. C. 458; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120; *Flynn v. Manhattan R. Co.* 1 Misc. 188, 20 N. Y. Supp. 652, and cases cited. Even though the objection to the testimony be well founded. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593.

And its refusal, if error, is harmless where the evidence was subsequently stricken out by consent. *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

Or it has been received absolutely and unconditionally, and not upon an unperformed promise to show its relevancy. *Hickman v. Green* (Mo.) 22 S. W. 455.

Or the interrogatory sought to be stricken out is not answered. *Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786.

So, granting or refusing the motion, if error, is not fatal where other testimony to the same effect was admitted without objection. *Spear v. Lyon*, 89 Cal. 36, 26 Pac. 619; *Saatoff v. Scott*, 103 Iowa, 201, 72 N. W. 492; *Baltimore & O. R. Co. v. State use of Chambers*, 81 Md. 371, 32 Atl. 401; *Hart v. McSwegan*, 14 Misc. 540, 36 N. Y. Supp. 11; *Landa v. Obert*, 5 Tex. Civ. App. 620, 25 S. W. 342.

Or the same facts had been previously established by competent testimony. *Manning v. Den* (Cal.) 24 Pac. 1059; *State v. Severson*, 78 Iowa, 653, 43 N. W. 533; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404; *Perrin v. State*, 81 Wis. 135, 50 N. W. 516.

And that evidence so admitted was subsequently stricken out, if error, is not fatal where the record discloses that it was in fact irrelevant. *Re Lasak*, 131 N. Y. 624, 30 N. E. 112.

According to *Lowrey v. Robinson*, 141 Pa. 189, 21 Atl. 513, refusal of such a motion is not revisable on appeal.

But according to some authorities it is the duty of the court when properly moved, at any stage of the trial, to exclude or direct the jury to disregard incompetent testimony. *Smith v. State*, 25 Fla. 517, 6 So. 482; *Sailors v. Nixon-Jones Printing Co.* 20 Ill. App. 509. See also *South Covington & C. Street R. Co. v. McCleave*, 18 Ky. 1. Rep. 1036, 38 S. W. 1055, where it is held that the court should, when properly moved, exclude the testimony of an incompetent witness upon being informed by counsel making the motion that he had allowed the witness to be sworn in-advertently and while suffering from a severe headache.

And in *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226, refusal to strike out material incompetent evidence was held presumptively prejudicial, requiring reversal unless no prejudice is shown to have resulted.

**McDonald v. Wood*, 118 Ala. 589, 24 So. 86; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *Woodiey v. Baltimore & P. R. Co.* 8 Mackey, 542; *Lake Side Press & Photo-Engraving Co. v. Campbell*, 39 Fla. 523, 22 So. 878; *Chicago, P. & St. L. R. Co. v. Blume*, 137 Ill. 448, 27 N. E. 601; *Jones*

v. *State*, 118 Ind. 39, 20 N. E. 634; *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682; *Atchison v. Rose*, 43 Kan. 605, 23 Pac. 561; *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121; *Burns v. Lindell R. Co.* 24 Mo. App. 10; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Standard Life & Acci. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856; *Holmes v. Roper*, 141 N. Y. 64, 36 N. E. 180; *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683, 21 N. E. 145; *Deming v. Gainey*, 95 N. C. 528; *Smith v. Northern P. R. Co.* 3 N. D. 555, 58 N. W. 345; *Price v. Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226; *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125.

Especially if there was no opportunity to previously object because the question did not indicate the nature of the answer. *Nichols v. Howe*, 43 Minn. 181, 45 N. W. 14. And the answer was given too quickly to permit the interposition of an objection. *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1, 405; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Board of Trade Teleg. Co. v. Blume*, 176 Ill. 247, 52 N. E. 258; *Vernon Ins. Co. v. Glenn*, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 829.

Otherwise, however, if the question clearly discloses the nature of the answer. *Campbell v. Connor*, 15 Ind. App. 23, 43 N. E. 453, 42 N. E. 688; *Larson v. Kelly*, 72 Minn. 116, 75 N. W. 13.

**Farmers' Bank v. Cowan*, 2 Abb. App. Dec. 88.

**Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L. R. A. 33, 65, 9 So. 661, 689; *State v. Farrell*, 82 Iowa, 553, 48 N. W. 940; *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23; *St. Louis Dredging Co. v. Crown Coal & Tow Co.* 77 Mo. App. 362.

So, counsel may, after eliciting on cross-examination facts showing that statements made voluntarily by the witness on his direct examination were irrelevant and incompetent, have the statements stricken out. *Brandon v. Lake Shore & M. S. R. Co.* 8 Ohio C. D. 642.

3. — after adversary's omission.

One who has drawn out incompetent evidence, even from his own witness, which has been received without exception being taken by his adversary, may be allowed, in the discretion of the court, to have it struck out¹ before the case is submitted.²

¹*Birmingham Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437; *Clark v. Boston & M. R. Co.* 164 Mass. 434, 41 N. E. 666; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *Carpenter v. Ward*, 30 N. Y. 243, 246 (where the adversary's right to impeach was reserved); *Roberts v. Johnson*, 5 Jones & S. 157, Affirmed in 58 N. Y. 613, without distinctly passing on this question (motion granted, though made after long delay); *Rutledge v. Mayfield* (Tex. Civ. App.) 26 S. W. 910. According to *Lynch v. McNally*, 7 Daly, 126, the motion must be immediately made (Affirmed in 73 N. Y. 347, without passing on the question).

And it is error to refuse to allow withdrawal from the jury of an improper statement volunteered by a witness, or made by mistake or inadvertence,

on his cross-examination in answer to a proper question. *Chicago, K. & W. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. 210; *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644. Unless the party himself was at fault in calling it out. *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644.

Other courts, however, hold that a party calling out illegal evidence has no right to have it excluded on his own motion. *Toliver v. State*, 94 Ala. 111, 10 So. 428; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Byrne v. Reed*, 75 Cal. 277, 17 Pac. 201; *Rceves Bros. v. Harrington*, 85 Iowa, 741, 52 N. W. 517; *Bryan v. Olsen*, 20 Misc. 604, 46 N. Y. Supp. 349; *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394. And that it is error to grant his motion over his adversary's objection. *Toliver v. State*, 94 Ala. 111, 10 So. 428.

**Farmers' Bank v. Cowan*, 2 Abb. App. Dec. 88.

— after unsuccessful objection.

A party against whose objection and exception evidence has been received, because apparently competent,¹ or upon the faith of a promise to connect,² is not, on subsequently establishing its incompetency, or on failure to connect, entitled as matter of right to have it stricken out, but only to have the jury instructed to disregard it. But the court may, in its discretion, grant a motion to strike it out.³

¹This is the rule in New York. *Gawtry v. Doane*, 51 N. Y. 84, Affirming 48 Barb. 148 (notary's certificate afterward shown void by extrinsic evidence).

Other courts, however, have not allowed this rule, but hold that a motion to strike is proper and should be granted. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *Collar v. Collar*, 86 Mich. 507, 13 L. R. A. 621, 49 N. W. 551. Even though, after repeated objections, the party objecting finally consented on request of juror that the evidence be allowed. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

And cross-examining a witness as to illegal evidence which he has been allowed to give over objection does not waive the right to have the evidence stricken out on motion. *Babcock v. Murray*, 69 Minn. 199, 71 N. W. 913; *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45.

**Marks v. King*, 64 N. Y. 628, Affirming 1 Hun. 435; *Platner v. Platner*, 78 N. Y. 90; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

On the other hand, other courts hold that in such case the motion to strike out is proper and should be granted. *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481; *Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136; *Seligman v. Ten Eyck*, 60 Mich. 267, 27 N. W. 514; *Little Klamath Water Ditch Co. v. Ream*, 27 Or. 129, 39 Pac. 998; *Huckins v. Kapf* (Tex. App.) 14 S. W. 1016.

And in Florida the court should of its own motion exclude the evidence. *Jenkins v. State*, 35 Fla. 737, 18 So. 182.

**Stokes v. Johnson*, 57 N. Y. 673.

The motion ought to be granted where the evidence is so prejudicial that instructions would not remove its effect. *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334; *O'Sullivan v. Roberts*, 7 Jones & S. 360.

Or where evidence to meet it has been excluded on the ground that the point is immaterial. *Gilbert v. Cherry*, 57 Ga. 128.

Or where its remaining in is sought to be used as a foundation for further evidence not otherwise admissible.

5. Delay in moving.

Omission to object to the evidence at the time is not fatal to a motion to strike it out at any time before the close of the evidence, if the delay is shown to have been from mistake or inadvertence; but the discretion should be carefully exercised, so that no harm may come to the other party.¹ If the motion be not made with reasonable promptitude it is not error to deny it.²

¹*Miller v. Montgomery*, 78 N. Y. 282, Affirming in effect 3 Redf. 154; *South Covington & C. Street R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

Contra, if there is nothing to excuse the delay. *Falvey v. Jackson*, 132 Ind. 176, 31 N. E. 531.

²*Goldman v. State*, 75 Md. 621, 23 Atl. 1097; *Gilmore v. Pittsburgh, V. & C. R. Co.* 104 Pa. 275.

Thus, where the motion is not made until the close of the cross-examination. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 525; *Briesenmeister v. Supreme Lodge K. of P. of the World*, 81 Mich. 525, 45 N. W. 977 (error to grant); *Caldwell v. Central Park, N. & E. River R. Co.* 7 Misc. 67, 27 N. Y. Supp. 397; *Bruce v. State*, 31 Tex. Crim. Rep. 590, 21 S. W. 681. Or until after plaintiff's testimony in chief is all in. *Warden v. Philadelphia*, 167 Pa. 523, 31 Atl. 928. Or until after the evidence is closed. *East Tennessee, V. & G. R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63; *Yetzer v. Young* (S. D.) 52 N. W. 1054 (error to grant); *Robertson v. Coates*, 1 Tex. Civ. App. 664, 20 S. W. 875; *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. 188. And the case partially argued. *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65. Or the trial closed. *Yetzer v. Young* (S. D.) 52 N. W. 1054.

But according to *Galveston, H. & S. A. R. Co. v. Scott*, 18 Tex. Civ. App. 321, 44 S. W. 589, and *Edisto Phosphate Co. v. Stanford*, 112 Ala. 493, 20 So. 613, the motion is not too late even after the evidence has closed, if the evidence is, in fact, illegal; the party injured by the ruling, if surprised, having his remedy by asking for an adjournment. *Edisto Phosphate Co. v. Stanford*, 112 Ala. 493, 20 So. 613.

And *Hamilton v. New York C. & H. R. R. Co.* 51 N. Y. 100, holds that omission to object when evidence is offered does not so concede its legality as to absolutely preclude its subsequently being withdrawn from the consideration of the jury, at the instance of the party objecting.

6. Form of motion—specifying evidence.

A motion to strike out evidence should be directed specifically to the particular evidence considered objectionable, and it is not error to deny a motion if any of the evidence to which it is directed was properly admitted.¹

¹*Preferred Acci. Ins. Co. v. Gray* (Ala.) 26 So. 517; *Hellman v. McWilliams*, 70 Cal. 494, 11 Pac. 659; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Woods v. Trinity Parish*, 21 D. C. 540; *Birmingham Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Wicks v. Dean*, 19 Ky. L. Rep. 1708, 44 S. W. 397; *Roeller v. Hall*, 62 Minn. 241, 64 N. W. 559; *Magee v. State* (Miss.) 21 So. 130; *Lee v. Bruggmann*, 37 Neb. 232, 55 N. W. 1053; *Delaney v. State*, 51 N. J. L. 37, 16 Atl. 267; *McCabe v. Brayton*, 38 N. Y. 196; *Thomas Roberts Stevenson Co. v. Tucker*, 14 Misc. 297, 35 N. Y. Supp. 682; *Fleck v. Rau*, 9 App. Div. 43, 41 N. Y. Supp. 64; *Minneapolis, St. P. & S. S. N. R. Co. v. Nester* (N. D.) 57 N. W. 510; *Finnegan v. Sullivan*, 1 Ohio Dec. 231; *Jennings v. Garner*, 30 Or. 344, 48 Pac. 177; *Eifert v. Lytle*, 172 Pa. 356, 33 Atl. 573; *Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 548, 18 S. W. 391; *Brown v. Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528.

7. — specifying grounds.

And the motion should specify the grounds upon which it is based.¹

¹*Etna Ins. Co. v. Le Roy*, 15 Ind. App. 49, 43 N. E. 570. The motion is in the nature of an objection to testimony, and even though there are grounds for objection, if they are not stated the court is not required to sustain the motion. *Smith v. Dawley*, 92 Iowa, 312, 60 N. W. 625.

So, a motion directed to evidence both irresponsible and incompetent should specify both grounds, and be carefully limited to such part of the evidence as is considered objectionable. *Gundlin v. Hamburg-American Packet Co.* 8 Misc. 291, 28 N. Y. Supp. 572; *People v. Spiegel*, 75 Hun, 161, 26 N. Y. Supp. 1041.

8. Power of the court.

Irrelevant evidence may be stricken out by the court¹ at any stage of the cause;² but a party who objected and excepted to its reception, and has been prejudiced by it, still has a right to meet it.³

¹*Monfort v. Rowland*, 38 N. J. Eq. 181; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *People v. Wilson*, 141 N. Y. 185, 36 N. E. 230. Especially where the court gave notice at the time of its introduction of his intention to do so. *First Nat. Bank v. Home Ins. Co.* 33 Or. 234, 52 Pac. 1055. And in *Mandeville v. Guernsey*, 51 Barb. 99, *Newman v. Goddard*, 3 Hun, 70, and *Koehue v. New York & Q. County R. Co.* 32 App. Div. 419, 52 N. Y. Supp. 1088, the practice was followed by the trial court, but not passed on by the appellate court, its consideration of the case being confined to the effect of the ruling, rather than the action itself. And in Florida it is the duty of the court to strike out evidence of its own motion received conditionally, when the condition is not complied with. *Jenkins v. State*, 35 Fla. 737, 18 So. 182.

Contra, *Lewars v. Weaver*, 121 Pa. 268, 15 Atl. 514, where it was held error for the court of its own motion to exclude as privileged communications certain statements, where no such claim was raised in opposition to their introduction when elicited. And according to *Thomas v. State*, 103 Ala. 18, 16 So. 4, the court should not, of its own motion, strike out testimony of a witness, elicited on cross-examination, as to statements made by him apparently contradicting his testimony in chief, together with his explanation of those statements.

The question seems to be, however, not so much the power of the court, but rather the proper exercise of its judicial discretion, so that the party who gave the evidence shall not be misled or placed at a disadvantage. *Re Lasak*, 131 N. Y. 624, 30 N. E. 112.

Where the court has already, of its own motion, excluded evidence from the jury, it is not error to refuse to again exclude it on a motion to strike out. *Rollins v. O'Farrell*, 77 Tex. 90, 13 S. W. 1021.

²*Maurice v. Worden*, 54 Md. 233, 251, 39 Am. Rep. 384; *Schiels v. Horbach*, 49 Neb. 262, 68 N. W. 524; *Wright v. Gillespie*, 43 Mo. App. 244.

As, during argument of counsel. *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781. And even after it has been commented on in the argument of counsel who adduced it. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

³See, for instance, *Anderson v. Rome, W. & O. R. Co* 54 N. Y. 334, and *O'Sullivan v. Roberts*, 7 Jones & S. 360.

XIII.—USE OF THE PLEADINGS.

1. Reading adversary's pleading.
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1. Reading adversary's pleading.

The pleading of a party in the action on trial is competent evidence against him of any relevant matter of fact contained therein, and is conclusive,¹ unless the court allow an amendment. A party whose pleading admits a conclusion of law is not thereby estopped from contesting it.²

¹*McNail v. Welch*, 26 Ill. App. 482, Affirmed in 125 Ill. 623, 18 N. E. 737; *Cook v. Barr*, 44 N. Y. 156, 158 (Earl, C.); *Neely v. Bair*, 144 Pa. 250, 22 Atl. 673; *Stockwell v. Loecher*, 9 Pa. Super. Ct. 241, following *Bowen v. De Lattre*, 6 Whart. 430; *Cook v. Hughes*, 37 Tex. 343; *Garrett v. McMahan*, 34 Tex. 307; *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125; *Lederer v. Rosenthal*, 99 Wis. 235, 74 N. W. 971, citing *Cook v. Barr* with approval.

Even though the pleading offered has been prepared by the party without the knowledge or consent of his counsel. *Pence v. Sweeney* (Idaho) 28 Pac. 413.

The disclosure of a garnishee is competent evidence in favor of an intervening claimant, as against plaintiff, to show that the property impounded by the garnishment is the same property to which the claimant is asserting a right, but not to support his claim. *Bradley v. Thorne*, 67 Minn. 281, 69 N. W. 909.

But where an answer in a libel suit pleads the truth of the matter charged to be libelous, and also a general denial, it is error to admit in evidence against defendant the former plea as a republication to show

malice. *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860. The reason is that the effect of its admission would be to destroy defendant's right to plead inconsistent defenses.

In Massachusetts, by statute, pleadings in a cause are not evidence in a trial, but are allegations only. This rule, however, is limited to the suit in which they are pleaded; outside of that, admissions and declarations of a party in his pleadings are competent against him if they appear to be his act, and not merely that of his attorney. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670. See further, *infra*, § 13.

But the weight to be given to it as evidence is solely for the jury. *Whitney v. Ticonderoga*, 53 Hun, 214, 6 N. Y. Supp. 844, citing *Mott v. Consumers' Ice Co.* 73 N. Y. 543.

**People ex rel. Purdy v. Marlborough Highway Comrs.* 54 N. Y. 276, 13 Am. Rep. 581; *Greer v. Latimer*, 47 S. C. 176, 25 S. E. 136.

A conclusion of law in a pleading is not admitted by failure to deny. *Dix v. German Ins. Co.* 65 Mo. App. 34.

2. — amending.

The court has a discretionary power to refuse to allow a party to amend at the trial by striking out an admission which his adversary relies on, where the applicant does not show that it was made under a mistake of fact;¹ and where the amendment proposed presents issues entirely new and different from those framed by the pleadings as they stand.²

¹*Miller v. Moore*, 1 E. D. Smith, 739.

So, also, if the pleading sought to be amended contain averments which, though claimed merely to be immaterial and unnecessary, may, if true, and not wholly irrelevant, be advantageous to the adversary as an admission. *Heller v. Royal Ins. Co.* 151 Pa. 101, 25 Atl. 83.

Leave to amend may be granted without prejudice to using the admission. *Kenah v. The John Markee, Jr.*, 3 Fed. Rep. 45; *Strong v. Dwight*, 11 Abb. Pr. N. S. 319.

**McGill v. Holmes*, 22 Misc. 514, 49 N. Y. Supp. 1000.

Or where it is sought by amending the answer so as to deny defendant's liability, at the commencement of the second trial, after a previous trial and appeal on the same pleadings. *Bishop v. Averill*, 19 Wash. 490, 53 Pac. 726.

But where defendant, though he admits signing a paper similar to the contract sued on, has not knowledge or information sufficient to form a belief as to whether the one set out as such is it, in fact, and therefore denies same, and asks leave to amend his answer so as to deny the genuineness of the signature, after the original contract has been put in evidence, it is error to refuse the amendment. *Corn Palace & Interstate Fair Asso. v. Hornick*, 100 Iowa, 578, 68 N. W. 1018.

3. — original, after amendment.

A pleading or an admission or allegation in a pleading, notwith-

standing it had been withdrawn or struck from the record by amendment, is competent in evidence against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by himself.¹ This rule rests on the general principle that whatever a party has said about his case may be proved against him. In its application, a question remains as to whether he who offers a pleading not signed or verified by the adverse party must give evidence to bring knowledge of it home to him.²

The weight of the evidence is another question.³

¹*Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284, and cases cited; *Bloomingtondale v. DuRell*, 1 Idaho, 33; *Baltimore & O. & C. R. Co. v. Evarts*, 112 Ind. 533, 14 N. E. 369; *Ludwig v. Blackshere*, 102 Iowa, 366, 71 N. W. 356; *Juncau v. Stunkle*, 40 Kan. 756, 20 Pac. 473; *Walser v. Wear*, 141 Mo. 443, 42 S. W. 928, and cases cited (overruling in effect all earlier conflicting cases); *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 456; *Strong v. Dwight*, 11 Ab. Pr. N. S. 319 (where the pleading has been verified by the party personally); *Fogg v. Edwards*, 20 Hun. 90; *New York & L. C. Transp. Co. v. Hurd*, 44 Hun. 17, and cases cited; *Alliance Review Pub. Co. v. Valentine*, 9 Ohio C. C. 387; *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617; *Goodbar Shoe Co. v. Sims* (Tex. Civ. App.) 43 S. W. 1065 (overruling previous cases to the contrary, and holding it error to exclude); *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195, 23 Pac. 415 (unless a mistake is shown); *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125; *Frcarson v. Loe*, L. R. 9 Ch. Div. 48, 66, 25 Moak, Eng. Rep. 747, 763 (Jessel, M. R.). Contra, *Mecham v. McKay*, 37 Cal. 154, and *Ponce v. McElvy*, 51 Cal. 222 (reversing judgments for error in admitting the original after amendment); *Gilmore v. Borders*, 2 How. (Miss.) 824; *Little Rock & Ft. S. R. Co. v. Clark*, 58 Ark. 490, 25 S. W. 504, and cases cited; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579, and cases cited; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871, and cases cited; *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731; *Ralphs v. Hensler*, 114 Cal. 196, 45 Pac. 1062; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360; *Lane v. Bryant*, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 584 (where the portion sought to be introduced had been abandoned on a motion to compel election between counts); *Smith v. Davidson*, 41 Fed. Rep. 172 (where the pleading was verified by counsel for the pleader).

So, an original pleading verified by the pleader may be used to impeach him as a witness, if its statements plainly contradict his evidence. *Re O'Connor*, 118 Cal. 69, 50 Pac. 4.

²According to the considered case of *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. 129, this is necessary, and without such evidence it is error to admit it. To the same effect is *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074.

According to *Bowen v. Powell*, 1 Lans. 1, it would be error to hold that the mere fact that the party had obtained standing in court by a pleading

not signed nor verified by him, nor otherwise brought home to him, was evidence of an admission of the truth of all contained in it.

So, an original complaint of an infant stating the cause of action on information and belief cannot be read against him where it was verified only by his guardian *ad litem*, and it was not shown that plaintiff was in any way responsible for it. *Geraty v. National Ice Co.* 16 App. Div. 174, 44 N. Y. Supp. 659.

¹It was justly said in *Elizabethport Mfg. Co. v. Campbell*, 13 Abb. Pr. 86, that a reference to original will not alone falsify statements of the amended pleading. The prima facie effect of amendment is an acknowledgment of mistake, and not an implication of having wilfully or knowingly made a false statement, its value depending upon its language and the circumstances under which signed, and the explanation, if any, given of it. *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah, 494, 45 Pac. 629. So, in *Graham v. Graham*, 50 N. J. Eq. 701, 25 Atl. 358, where an amendment was allowed on counsel's representation that the averment sought to be used as an admission was made inadvertently, and that the amendment alleged what was really intended to be said, it was held that while the averment might have probative force to the extent that the pleader made the admission, it was of but small moment in view of counsel's explanation.

4. — showing personal sanction.

The party may be asked whether he has given the facts to his attorney or counsel, for the purpose of pleading; because, if the conversation is not called for, this does not violate the rule of privilege.¹

¹*Ross-Lewin v. Redfield*, 68 N. Y. 627.

5. — contradicting part.

A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it.¹

¹*Mott v. Consumers' Ice Co.* 73 N. Y. 543; *Young v. Katz*, 22 App. Div. 542, 48 N. Y. Supp. 187 (*dictum*); *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675, and cases cited. Contra, *McCord v. Durant*, 134 Pa. 184, 19 Atl. 489.

So held where plaintiff suing a master put in evidence, to show the injury, the answer alleging the act to have been the wilful, and not negligent, act of the servant. Held, error to hold plaintiff estopped thereby. See also *Fogg v. Edwards*, 20 Hun, 90.

6. — allegations in verification of adversary's pleading.

Allegations of agency, etc., in past transactions, contained in the usual affidavit of verification, are not competent evidence of such agency against the party whose pleading is thus verified, without other evidence to connect him therewith.¹

¹*Bowen v. Powell*, 1 Lans. 1; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L. R. A. 236, 21 Pac. 925.

7. — mere extract may be read.

A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he does not omit a part of the sentence or clause which qualifies that part which he reads, so as to pervert the sense or render it uncertain.¹

¹*Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652, 61 N. W. 485; *Bompart v. Lucas*, 32 Mo. 123; *Algase v. Horse Owners' Mut. Indemnity Asso.* 77 Hun, 472, 29 N. Y. Supp. 101; *Cromwell v. Hughes*, 12 Misc. 372, 33 N. Y. Supp. 643; *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33, and cases cited; *McDonald v. McDonald*, 16 Vt. 630.

Thus, the answer of the defendant may be read in evidence by the plaintiff in an action for conversion to prove possession of the goods by the defendant, even though defendant by his other allegations avers that such possession was lawful by virtue of a purchase of the goods from a person having title thereto, and even though such admission constitutes the only evidence of possession by defendant, and plaintiff relies on other evidence to show the wrongful possession. *Foster v. Henry*, 5 Alb. L. J. 173.

But it is not fatal error to exclude a paragraph of a pleading offered in evidence to establish a certain fact, where the fact is shown by the testimony of a witness. *Western U. Teleg. Co. v. Sanders* (Tex. Civ. App.) 26 S. W. 734.

8. — but adversary may read residue.

When one party has read in evidence an extract from his adversary's pleadings, the adversary has a right to read as much more as may be necessary to qualify or explain that which has been read, but not an allegation of a distinct fact in avoidance.¹

¹This appears to be the sound rule and in harmony with the general principle as to putting in evidence the whole of the declaration or admission (*Rouse v. Whited*, 25 N. Y. 170, 80 Am. Dec. 337, Reversing 25 Barb. 279), which is properly applicable to written declarations, affidavits, etc., as well as oral. *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 284, 44 Am. Rep. 372; *Honstine v. O'Donnell*, 5 Hun, 472, 474. It was applied to a pleading in *Goodyear v. De La Vergne*, 10 Hun, 537, 539.

The conflict of opinion on this point may be shortly stated as the question: Which should prevail,—the old common-law rule that when a party has read a portion of a book or other document on his own behalf the adverse party is entitled to read anything else from the same document, or the modern rule as to admissions generally, that when a party proves an admission or declaration the adverse party is entitled to prove as much of the residue as tends to explain or qualify it, but not statements of distinct matters?

The latter I deem to be the true rule applicable to the reading of pleadings as evidence, because they are read simply as admissions; and it

is supported by *Gunn v. Todd*, 21 Mo. 303; *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Spencer v. Fortescue*, 112 N. C. 268, 16 S. E. 898; *Medlin v. Wilkens*, 1 Tex. Civ. App. 465, 20 S. W. 1026.

To the contrary in *Godden v. Pierson*, 42 Ala. 370, and the headnote in *Gildersleeve v. Mahoney*, 5 Duer, 383, which, however, is not borne out by the decision.

See, further, on the origin of this question, *Hart v. Ten Eyck*, 2 Johns. Ch. 90; *Green v. Hart*, 1 Johns. 580; *McDonald v. McDonald*, 16 Vt. 634.

9. Pleading of one party not admissible against another.

It is a general rule, however, that the pleading of one party is not admissible in evidence against another party, unless there is shown to be a joint interest, privity, fraud, collusion, or combination between them,¹ or unless it is adopted by the party against whom it is sought to introduce.²

¹*Indianapolis, D. & W. R. Co. v. Center Twp.* 143 Ind. 63, 40 N. E. 134; *Walker v. Cole* (Tex. Civ. App.) 27 S. W. 882; *Wytheville Crystal Ice & Dairy Co. v. Frick Co.* 96 Va. 141, 30 S. E. 491.

So, statements in an answer of one defendant, admitting his authority as agent for a codefendant to make the contract sued on, are not competent evidence as against his codefendant to prove the agency. *Fisher v. White*, 94 Va. 236, 26 S. E. 573.

And in an action against the infant and other heirs of a decedent, an answer by the personal representative of decedent, though it contains admissions of facts alleged in the bill, is not evidence against the infant heirs. *Ingram v. Ilges*, 98 Ala. 511, 13 So. 548.

But in an action by a vendee of land against his vendor and a grantee under a conveyance from the vendor, to cancel the conveyance and for specific performance, the answer of the vendor is admissible against his grantee. *Lockland v. Miller* (Mass.) 22 So. 822.

²*Hanover Nat. Bank v. Klein*, 64 Miss. 141, 8 So. 208, and cases cited.

10. Reading one's own pleading—matter in issue.

A party is not entitled to read to the jury from his own pleading anything which has been put in issue,¹ except so far as it may be necessarily read to explain a responsive pleading properly in evidence, even though the jury be instructed by the court that it is not evidence.²

¹*Green v. Morse*, 57 Neb. 391, 77 N. W. 925; *Stewart v. Demming*, 54 Neb. 7, 74 N. W. 265; *Corcoran v. Trich*, (Pa.) 10 Cent. Rep. 624, 11 Atl. 677; *Scales v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 35 S. W. 205, and cases cited.

And according to *Sweetzer v. Claflin*, 74 Tex. 667, 12 S. W. 395, pleadings that have been formally withdrawn during the trial cannot be subsequently introduced in evidence by the pleader.

*The principle is well stated in *Lancaster v. Arendell*, 2 Heisk. 434, a case, however, which arose on the reading of a petition for discovery. Judgment reversed for error in allowing it to be read even with such instructions.

But a defendant who, on a petition for discovery being read in evidence, fails to ask any instruction or ruling limiting its use to showing to what the answer is responsive, where the answer would otherwise be unintelligible, cannot complain on appeal that its use was not so limited,—especially if he cannot have been prejudiced by the reading of any portion of the petition to which the answer was responsive. *Grimes v. Hilary*, 150 Ill. 141, 36 N. E. 977.

11. — matter admitted.

Material allegations in a complaint which are not put in issue, or in an answer requiring a reply and admitted by failure to reply, are competent evidence¹ in favor of the party making the allegation, except allegations as to amount of damages.²

¹*Lettick v. Honnold*, 33 Ill. 335; *Boeker v. Hess*, 34 Ill. App. 332.

²*Jennings v. Asten*, 5 Duer, 695, 2 Abb. Pr. 373 (*dictum*).

The reason of this exception is, that allegations of damages are not admitted by failure to deny.

12. Necessity of putting a pleading in evidence.

The pleadings in the cause are before the court and jury, and may be read and commented upon for the purpose of defining the issue and showing what part of the charge to be tried is admitted without having been formally put in evidence.¹

¹*Shepard v. Mills*, 70 Ill. App. 72; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. 805; *School Town v. Grant*, 104 Ind. 168, 1 N. E. 302; *Claflin v. New York Standard Watch Co.* 3 Misc. 629, 23 N. Y. Supp. 324; *Holmes v. Jones*, 69 Hun, 346, 23 N. Y. Supp. 631; *Holmes v. Jones*, 121 461, 24 N. E. 701, and see *ante*, chapter V. § 4; *White v. Smith*, 46 N. Y. 418 (before a referee); *Baltzer v. Chicago, M. & N. R. Co.* 89 Wis. 257, 60 N. W. 716. Contra, *Fash v. Third Ave. R. Co.* 1 Daly, 148; *Mullen v. Union Cent. L. Ins. Co.* 182 Pa. 150, 37 Atl. 988. And see *Frank v. Davenport*, 105 Iowa, 588, 75 N. W. 480, where the court prefaced its oral charge by reading a pleading not supported by any evidence, which, while not expressly declared to be error, was held not to be fatal, because later in the charge it called attention specially to the issues which had support in the testimony.

This principle was impliedly recognized in *Cook v. Merritt*, 15 Colo. 212, 25 Pac. 176, where, although an attempt by one to read his own pleadings in order to show admissions by his adversary was denied, the denial was held justifiable because the issue framed by the pleadings was clearly defined, and thoroughly understood at the trial by all parties.

The rule was, however, held not to apply to original pleadings which had been superseded by amendment or otherwise, in *Leach v. Hill*, 97 Iowa,

81, 66 N. W. 69, and *Folger v. Boyinton*, 67 Wis. 447, 30 N. W. 715 Contra, *Smith v. Pelott*, 63 Hun, 632, 18 N. Y. Supp. 301.

According to *Greenville Comrs. v. Old Dominion S. S. Co.* 104 N. C. 91, 10 S. E. 147, the pleadings furnish no evidence on which the jury can act, unless they are formally introduced.

13. Reading pleadings in another action.

The pleading of a party in another action is competent evidence against him of any relevant¹ matter of fact contained therein, if it be shown that the matter was inserted with his knowledge and sanction.² Like other admissions, however, they are subject to rebuttal and explanation or qualification, unless the circumstances render them estoppels under the law.³

But a pleading in another action is not competent evidence against one who was a stranger thereto, and in no way, by privity or otherwise, connected with the pleader.⁴

Nor can either party read in evidence in his own favor his own pleadings in another action.⁵

¹*Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589; *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55; *Robinson v. Woodmansee*, 80 Ga. 249, 4 S. E. 497; *Printup v. Patton*, 91 Ga. 422, 18 S. E. 311; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132; *Wadsworth v. Laurie*, 164 Ill. 42, 45 N. E. 435; *Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653; *Fairbanks v. Badger*, 46 Ill. App. 644; *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717; *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Radclyffe v. Barton*, 161 Mass. 327, 37 N. E. 373; *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019; *O'Riley v. Clampet*, 53 Minn. 539, 55 N. W. 740; *Rich v. Minneapolis*, 40 Minn. 82, 41 N. W. 455 (not error to reject when irrelevant); *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *Williamson Corset & Brace Co. v. Western Corset Co.* 70 Mo. App. 424 (not error to exclude if irrelevant); *Neudecker v. Kohlberg*, 81 N. Y. 296 (holding it error to receive it when not relevant); *Feldman v. McGuire* (Or.) 55 Pac. 872; *Kline v. First Nat. Bank* (Pa.) 15 Atl. 433; *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138, and cases cited (where the pleading was signed and sworn to by the party); *Davis v. Converse* (Tex. Civ. App.) 46 S. W. 910; *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714 (error to exclude). See, also, *Kashman v. Parsons*, 70 Conn. 295, 39 Atl. 179, where this principle was applied to a request for special findings in a former similar action between the same parties: *Keesting v. Doyle*, 8 Ind. App. 43, 35 N. E. 126, an action for malicious prosecution by the defendant in a former ejectment suit against the plaintiffs therein and their grantee, in which the complaint and judgment in the ejectment suit were held competent evidence against defendants, as tending to show malice and want of probable cause, and plaintiff's right to possession of the land, even though defendant's grantee was not a party to the ejectment suit. But *Keyser v. Pickrell*, 6

App. D. C. 198, seems to hold that the record of another and different action by another plaintiff, although against the same defendant, cannot be introduced against defendant to show admissions or recitals of facts made by him therein.

But relevancy is necessary as well as sanction and knowledge. *New York v. Fay*, 53 Hun, 553, 23 Abb. N. C. 390, 6 N. Y. Supp. 400. And there is no error in excluding a pleading offered to show a fact expressly admitted by the pleader. *Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242. Nor is its improper admission fatal error where the fact is otherwise fully established. *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004.

A verified answer in another action by another plaintiff against the same defendant cannot be introduced as part of the cross-examination of the pleader to contradict or impeach him, though it seems it may be introduced for that purpose after he has been properly examined as to whether he had made statements therein variant from his testimony. *Williams v. Miller*, 6 Kan. App. 626, 49 Pac. 703.

According to *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307, a second action against the same parties on the same cause of action, a plea of set-off and copy of account attached thereto are inadmissible without the declaration.

Duff v. Duff, 71 Cal. 513, 12 Pac. 570, and cases cited; *Cook v. Barr*, 44 N. Y. 156; *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024 (*dictum*).

So held where the other action was brought in the name and for the benefit of the party by his attorney in fact, and was prosecuted with his knowledge and consent. *Kamm v. Bank of California*, 74 Cal. 191, 15 Pac. 765. Otherwise, however, where the agency is established only by the declaration of the alleged agent in verifying the pleading. Its only legitimate purpose in such case is to impeach the testimony of the agent. *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L. R. A. 236, 21 Pac. 925.

This principle was recognized, though not directly involved, in *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271, where a general objection to the introduction of an unverified pleading as irrelevant, etc., was held to have been properly overruled as too general, the court stating that if the objection had specified insufficient showing of knowledge and sanction as the true ground on which exclusion was sought, knowledge and sanction might have been shown and the objection obviated.

So, under a statute providing that an allegation in a complaint not denied in the answer shall be taken as true, the pleadings in a former action against the same defendant on the same cause of action are admissible to show that defendant had, in the former action, admitted by not denying a fact pleaded in defense of the present action. *Grant v. Gooch*, 105 N. C. 278, 11 S. E. 571.

In California, although a superseded original pleading is not competent evidence against the pleader in the same action (see *supra*, § 3), this rule does not apply to a superseded original pleading in another action. *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359.

The fact that the pleading is made on information and belief does not affect its competency, but goes only to its weight, as evidence. *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69, and cases cited.

So, as to a pleading signed only by counsel, specific and particular allegations of matters of action or defense which cannot be presumed to have been made under a general authority of the attorney, but are obvious from specific instructions of the party, are competent. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670; *Dennie v. Williams*, 135 Mass. 28, and cases cited. Especially where it further appears that the pleader in effect adopted the pleading by making it the basis of his claim for the judgment in his favor which he obtained in the other action. *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55, and cases cited. And it is error to exclude such a pleading, notwithstanding the pleader testifies that he has never seen the pleading and did not know its contents, though not denying that he had given instructions, as his testimony cannot overcome the presumption that it was made under his instructions. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670.

But a pleading signed by an attorney containing formal allegations which may be presumed to have been made without special instruction from his client, or at least are not shown to have been made on information from, or with knowledge of, the client, is not competent. *Delaware County Comrs. v. Diebold Safe & Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399; *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004; *Deane v. Williams*, 135 Mass. 28, and cases cited; *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443; *Brown v. Jewett*, 120 Mass. 215. And so, even though the pleading contain express admissions of fact, where the attorney who drew it testifies that his client, in stating the case to him, did not make the admissions. *International & G. N. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152.

And in *McDermott v. Mitchell*, 47 Cal. 249, a joint answer by two defendants, signed by their attorneys and verified by only one of them, was held inadmissible in a subsequent action against the defendant who did not sign or verify it.

But in Georgia all allegations of fact material and necessary to the pleading, though it be unverified and signed only by counsel, are regarded as having been made by the party himself, and, as such, are his declarations, and if against his interest are admissible against him. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92.

A pleading signed by an attorney is not, in a subsequent action between other parties, competent as against a party thereto, on the ground that the party for whom the pleading was filed was acting as his agent where there is no evidence that they were made on information furnished by or with knowledge of the agent. *London & L. F. Ins. Co. v. Schwulst* (Tex. Civ. App.) 46 S. W. 89.

**Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589; *Robinson v. Parker*, 11 App. D. C. 132; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Harris v. Amoskeag Lumber Co.* 101 Ga. 641, 29 S. E. 302; *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802, and cases cited; *Sweet v. Tuttle*, 14 N. Y. 465.

But refusal to permit a party to introduce an entire complaint verified by him in a former action, to explain the portion admitted in behalf of his adversary, is proper, where the court's offer to receive any portion which it is thought will explain the portion admitted is unaccepted, and no ef-

fort is made to specify the explanatory portions of the complaint. *Lof-tus v. Fischer*, 113 Cal. 286, 45 Pac. 328.

**Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969; *Stockbridge v. Fahnestock*, 87 Md. 127, 39 Atl. 95; *Tyler v. Old Colony R. Co.* 157 Mass. 336, 32 N. E. 227; *Hodge v. Eastern R. Co.* 70 Minn. 193, 72 N. W. 1074; *Davis v. Green*, 102 Mo. 170, 11 L. R. A. 90, 14 S. W. 876; *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608; *Euless v. Russell* (Tex. Civ. App.) 34 S. W. 176.

So, allegations or admissions made in a petition filed by former receivers after the commencement of the present action and signed only by their solicitor, reciting the facts on which they sought an order of court authorizing them to settle the account and differences with the plaintiff, their successor, are not admissible against the plaintiff. *Liverpool & L. & G. Ins. Co. v. McNeill*, 59 U. S. App. 499, 89 Fed. Rep. 139, 32 C. C. A. 173.

**Bush v. Monroe*, 20 Ky. L. Rep. 547, 47 S. W. 215; *Johnson v. Stone*, 69 Miss. 826, 13 So. 858; *Bell v. Throop*, 140 Pa. 641, 21 Atl. 408.

4. Copy not best evidence.

If a pleading is offered in evidence as an admission of the party, is original, and not a copy of record, is the best evidence.¹

¹*Nash v. Hunt*, 116 Mass. 237, 248. Contra, by statute in Georgia. *Belt v. State*, 103 Ga. 12, 29 S. E. 451. And in *Withrow v. Adams*, 4 Tex. Civ. App. 438, 23 S. W. 437, record copies were admitted, their legitimacy as evidence being questioned, not as being secondary, but as being irrelevant, etc.

But the admission of record proof of undenied allegations is not prejudicial. *Jones v. Allen*, 56 U. S. App. 529, 85 Fed. Rep. 523, 29 C. C. A. 318.

Whether the original copy served by him on the party offering it would be competent, compare *Pratt v. Norton*, 5 Thomp. & C. 8, 3 Abb. N. Y. Dig. new ed., p. 60, § 869, etc.

XIV.—EXHIBITION AND VIEW.

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|----------------------------------|-------------------------|
| 1. Exhibiting person—identity. | 9. — application. |
| 2. — age; legitimacy; paternity. | 10. — vacating order. |
| 3. — personal injury. | 11. — time. |
| 4. Exhibiting chattel. | 12. —mode. |
| 5. —photographs. | 13. —experiment. |
| 6. View; statute. | 14. —unauthorized view. |
| 7. —discretion of court. | 15. Experiments. |
| 8. —object. | |

1. Exhibiting person—identity.

On the trial of an issue involving the identity of a person, the court may allow him to be brought before the jury in order that a witness may look upon him and testify.¹

And a party summoned as a witness, though not sworn, may, on request of his adversary, be required to uncover his face to permit a witness on the stand to identify him.²

¹*Atty. Gen. v. Fadden*, 1 Price, 403 (where *habeas corpus ad testificandum* was allowed, to bring him up).

²*Rice v. Rice* (N. J. Eq.) 19 Atl. 736.

This for the purpose of identification only, however; whether he may be required to do some act in or out of court by which he will be furnishing or giving testimony against himself is another question.

2. — age; legitimacy; paternity.

On the trial of an issue involving the age of a child, the court may allow the child to be shown to the jury.¹

So, also, on an issue of the legitimacy of a child alleged to be of mixed blood.²

But as to whether, on an issue of paternity, the court should allow the child to be shown to the jury, the decisions are not harmonious. Some of the courts allow it to be done,³ irrespective of the child's age.⁴ Others have, however, refused to do so when the child was a

the infant,⁵ but allow it to be done if the child has attained an age when its features have assumed some degree of maturity and permanency.⁶ Still others go to the extent of excluding the child, irrespective of its age.⁷

⁵N. Y. Laws 1882, p. 421, chap. 340; Pen. Code, § 19. In any proceeding it is matter of right to exhibit the child, on a question of age.

⁶*Warlick v. White*, 76 N. C. 175 (refusal to allow it to be exhibited held error).

⁷It is allowed for the purpose of having the jury by inspection trace any possible resemblance between the child and its alleged father, the court proceeding on the theory that any such resemblance, if traceable, is relevant to the issue, and the best evidence of it is produced by an inspection. *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750. And that, although taken by itself, proof of such resemblance would be insufficient to establish paternity. It clearly is a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass. *Finnegan v. Dugan*, 14 Allen, 197 (where the judge's charge that the jury might consider whether there was any resemblance between the child, who was in court, and the defendant was upheld). And the same court in *Eddy v. Gray*, 4 Allen, 435, sustained a ruling rejecting testimony upon the same subject, upon the ground that it did not come within the rule of expert testimony.

In *State v. Woodruff*, 67 N. C. 89, the charge of the court that the resemblance of a child to its alleged father was relevant, was held good.

And in *State v. Horton*, 100 N. C. 443, 6 S. E. 238, a prosecution for seduction, the child was exhibited to the jury on the theory that the resemblance traceable was corroborative of the fact of sexual intercourse between the prosecutrix and the defendant.

In *Jones v. Jones*, 45 Md. 144, the court permitted the jury to judge as to a personal resemblance, but not to hear testimony on that subject, on the ground that where the parties are before the jury whatever resemblance there is will be directly apparent, capable of being traced by the jurors themselves, but to permit third persons to give their opinions would be raising a class of experts where expertism does not exist.

In the New York cases which prohibit testimony upon resemblances, the question of inspection by the jury does not arise. But in *Petrie v. Howe*, 4 Thomp. & C. 85, the court in rejecting testimony says: "If this species of physiological evidence is admissible, it should not be covertly introduced." In that case, which was for *crim. con.*, the court had received testimony as to the color of the hair of plaintiff's other children, the illegitimate child having hair of a different color.

In *Gilmanton v. Ham*, 38 N. H. 108, counsel commented on the resemblance of the child to defendant, and his right to do so was sustained on the ground that the matter was relevant and the parties before the jury. See also *People v. Wing*, 115 Mich. 698, 74 N. W. 179.

⁸*Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871, and cases cited. Its youth going rather to the weight of the evidence.

**Overlock v. Hall*, 81 Me. 348, 17 Atl. 169 (child six months old); *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56 (child six weeks old), a well-considered case in which many cases are collated and classified.

And in *Copeland v. State* (Tex. Crim. App.) 40 S. W. 589, the proffer of a child six weeks old was held to have been properly refused, in the absence of any offer to prove a resemblance as to features.

**Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337. Even though the comparison is to be made with a photograph of the putative father who is dead *Ibid.*

Thus, an infant two years old may be exhibited to the jury (*State v. Smith* 54 Iowa, 104, 6 N. W. 153), while an infant three months old cannot (*State v. Danforth*, 48 Iowa, 45).

This discrimination was disapproved in 22 Alb. L. J. 43, and in *Gault v. State*, 50 N. J. L. 490, 14 Atl. 600, was said to rest "upon a physiological notion adopted by the court, which can scarcely find justification as a rule of evidence."

**Robnett v. People*, 16 Ill. App. 299; *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489.

In *Ingram v. State ex rel. McIntosh*, 24 Neb. 33, 37 N. W. 943, the prosecuting attorney's request that the prosecutrix turn the child's face to the jury for inspection was denied by the court and the child at once removed from the jury's presence.

In *Risk v. State ex rel. Vestal*, 19 Ind. 152, a child three months old was put in evidence, but the court held that, as there had been no objection to the evidence, the jury had a right to consider it.

In *Reitz v. State ex rel. Holden*, 33 Ind. 187, while showing the child was regarded as improper, the error was cured by the court charging the jury that they must regard only the oral evidence on the question of resemblance.

In *LaMatt v. State ex rel. Lucas*, 128 Ind. 123, 27 N. E. 346, while this question was not directly involved it was held that any misconduct of the jury in inspecting the child during a recess of court was not ground for new trial, where the court subsequently instructed the jury that they must consider only the oral testimony given.

3. — personal injury.

The court may allow a witness testifying in his own behalf respecting injuries to his person, to exhibit the injured part to the jury.¹

And the court may allow a physician testifying as an expert on behalf of the party injured to examine the injured parts in the presence of the jury, and exhibit and describe the then condition of the party.²

But whether the court can compel the witness to so exhibit his wounds, or to submit to a medical examination in presence of the jury, is contested.³

¹*Townsend v. Briggs* (Cal.) 32 Pac. 307; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Indiana Car Co. v. Parker*, 100 Ind. 199; *Hess v. Lowrey*, 122 Ind. 225, 7 L. R. A. 90, 23 N. E. 156, and cases cited;

Topeka v. Bradshaw, 5 Kan. App. 879, 48 Pac. 751; *Edwards v. Three Rivers*, 96 Mich. 625, 55 N. W. 1003; *Hiller v. Sharon Springs*, 28 Hun, 344; *Mulhado v. Brooklyn City R. Co.* 30 N. Y. 370; *Jordan v. Bowen*, 14 Jones & S. 355; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L. R. A. 50, 19 S. E. 571. But see *Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159. In this case, however, an action for malpractice, several years had elapsed since the date of treatment, and the court based its refusal on the ground that as the injury was healed no inspection, apart from some knowledge of the character of the injury and the method of treatment, could enable even a medical expert to decide upon the merits or demerits of the treatment; and that the jury's guessing from an inspection would be of no value whatever; and on the further ground that by reason of the location of the injury the inspection would have been improper, if not indecent. And according to *French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530, a suit for injuries caused by a dog bite, in which the trial took place over three years after the bite and nine months after the expiration of the time fixed by the declaration during which plaintiff suffered from the bite, he could not exhibit the then condition of his limb without any testimony tending to show no change for the worse.

The propriety of the practice cannot be questioned on the ground that the exhibition would tend to unduly excite the sympathy of the jury by reason of the youth and comeliness of the witness, who is a female. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675. Nor on the ground that the injury has not been properly treated. *Plummer v. Milan*, 79 Mo. App. 439.

And the jury may be permitted to examine with their fingers the scars caused by the alleged blow, for which damages are asked. *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528.

So, the court may allow the witness to be brought in on a cot or lounge and remain thereon while testifying. *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. 913; *Selleck v. Janesville*, 100 Wis. 157, 1 L. R. A. 563, 75 N. W. 975. His right to be present certainly cannot be questioned, and if his condition as thus exhibited excites sympathy it is the result of defendant's negligence.

**Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16.

And place him in different attitudes, to enable the jury to determine the extent of his disability. *Citizens' Street R. Co. v. Willocby*, 134 Ind. 563, 33 N. E. 637.

*Affirmative:—*Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442, 8 So. 90; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 486, 31 S. W. 147 (discretionary to order it to be made in court or out); *Hall v. Manson*, 99 Iowa, 698, 34 L. R. A. 207, 68 N. W. 922; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375 (a well-reasoned case); *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 49 Am. Rep. 484 (citing and quoting with approval *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375); *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154, 21 N.

W. 524. And according to *Demenstein v. Richardson*, 2 Pa. Dist. R. 8 one suing for personal injuries the extent of which can be determined only by such an examination puts his person in evidence, and whether examination is required of him in the court room or in an adjacent room during trial or before trial, is mere matter of detail. See also *Gravitt v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, 54 N. W. 757 (sustain the power on the theory that as the injured party may exhibit wounds to the jury, the right to compel him to do so ought to be accorded his adversary, if it can be done with due regard to decency, and in the orderly conduct of the trial).

Some courts, however, seem to regard this power as discretionary, to be exercised or not, according as there is shown to be a necessity for, and a profitable benefit to be derived from, the examination. *Terre Haute I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. And if such a showing be made, refusal of the application is fatal error. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442, 8 So. 90.

But the application should not be granted if the examination will necessarily involve the use of anæsthetics. *Sturgeon v. Sand Beach*, 107 Mich. 465 N. W. 616.

This power is recognized, however, if the party has already voluntarily submitted the injured part to the inspection of the jury as evidence (*Heynes v. Trenton*, 123 Mo. 326, 27 S. W. 622; *Winner v. Lathrop*, Hun, 511, 22 N. Y. Supp. 516), the courts proceeding on the theory that as it is then in evidence, it stands on the same footing as any other evidence, the character or quality of which is in issue, and cannot be withdrawn until the party affected by it has had an opportunity to apply every proper test for the purpose of overcoming or reducing its probative force and effect.

Negative:—*Illinois C. R. Co. v. Griffin*, 80 Fed. Rep. 278, 53 U. S. App. 22, 25 C. C. A. 413; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 240 Atl. 1114; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 98, and cases cited; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *People v. McCoy*, 45 How. Pr. 216 (criminal cases).

In *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 429 N. E. 235, the rule laid down by *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, that neither the common law nor the inherent power of courts in the exercise of their jurisdiction warrants or authorizes a physical examination of the party without his consent, was followed. And this rule was applied to compulsory examinations both before and at trial. *Ibid.*, and cases cited. But in 1894, by amendment to § 873, Code of Civil Procedure, power was expressly given trial courts to order a compulsory physical examination of one suing for personal injuries, if the requisite showing be made by the party applying therefor. But this power is limited to examinations before trial (*Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113; *Green v. Middlesex Valley R. Co.* 31 App. Div. 412, 53 N. Y. Supp. 500; *Sewell v. Butler*, 16 App. Div. 77, 44 N. Y. Supp. 1074) and does not apply to examinations during trial and in the presence of the jury. *Cole v. Fall Brook Coal Co.* 87 Hun, 584, 34 N. Y. Supp. 572; *Neill v. Brooklyn Elev. R. Co.* 13 Misc. 403, 34 N. Y. Supp. 114.

In several states the express question stated in the text seems never to have been directly involved and passed upon; the cases involving, rather, the question of the existence or nonexistence of the power of the court during trial to compel the injured party to submit himself to a physical examination by experts, to be either selected by the court or agreed upon by the parties, with a view to their subsequently testifying as to the nature and extent of the injuries as shown by the examination. See, for instance, *Missouri P. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Gulf, C. & S. F. R. Co. v. Pendery*, 14 Tex. Civ. App. 60, 36 S. W. 793; *Houston & T. C. R. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Belt Electric Line Co. v. Allen*, 19 Ky. L. Rep. 1656, 44 S. W. 89; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350, and cases cited (a leading case); *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587; *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62; *Lane v. Spokane Falls & N. R. Co.* (Wash.) 46 L. R. A. 153, 57 Pac. 367 (considering and classifying the cases). And for other cases see note to *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466.

1. Exhibiting chattel.

On the trial of an issue involving the quality or condition of a chattel the court may allow the thing to be shown to the jury, upon proper evidence as to the identity of the thing and of its condition at the time in question;¹ but not where its condition at the time of the trial is such that the determination of its original condition or quality is not a question of common knowledge, but necessarily requires a particular scientific knowledge and expertness.² Whether the court can compel a party to produce a chattel for such examination, even though it be in court, is not clear.³

And it is proper to exhibit to the jury any physical object which tends to establish any controverted fact or issue.⁴

¹*Von Recden v. Evans*, 52 Ill. App. 209; *Columbia City v. Langohr*, 20 Ind. App. 395, 50 N. E. 831 (a board from the walk at the place where plaintiff was injured); *Fogg v. Rodgers*, 84 Ky. 558, 2 S. W. 248; *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099; *Stevenson v. Michigan Log Towing Co.* 103 Mich. 412, 61 N. W. 536; *King v. New York C. & H. R. R. Co.* 72 N. Y. 607 (iron hook broken from alleged flaw. In this case some stress was laid on the fact that the question was one of common knowledge as justifying the exhibition of the object); *People v. Gonzalez*, 35 N. Y. 49; *Ruloff's Case*, 11 Abb. Pr. N. S. 245, s. c., less fully, as *Ruloff v. People*, 45 N. Y. 213; *People v. Muller*, 32 Hun, 209 (photographs; on indictment for the sale of them, as deemed obscene); *Cleveland, C. C. & St. L. R. Co. v. McKelvey*, 12 Ohio C. C. 426 (sparks shown to have come from an engine claimed to have set buildings on fire); *Luie v. Taylor*, 3 Fost. & F. 731.

But its condition must be shown to have remained unchanged. *Foots v. Woodworth*, 66 Vt. 216, 28 Atl. 1034.

And it must be fully identified. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

In California, by statute, "material objects presented to the senses" are made evidence and may be exhibited to the jury if they have such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence. And according to *Thomas Fruit Co. v. Stark*, 107 Cal. 206, 40 Pac. 336, samples of work done under contract, although not shown to be fair samples, may be exhibited on the question of defective performance of the contract. Whether they are fair samples or not is a circumstance affecting their weight, and not their admissibility, as evidence.

Whether articles proposed to be exhibited in court are too cumbersome or not is a question addressed to the discretion of the presiding judge. *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

*So held, on an issue of the soundness or unsoundness of a railroad rail, as to pieces of the broken rail claimed to have been picked up at the time of and six months after the accident, during which time they had been exposed to the weather. *Stewart v. Evarts*, 76 Wis. 35, 44 N. W. 1042.

*According to *Hunter v. Allen*, 35 Barb. 42, it is not error to refuse. *Dictum*, that it would be error to compel it. But query. But *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871, holds that granting such an application is within the discretion of the trial court.

*As the clothing worn by a party when injured, as tending to show which of two conflicting theories as to the cause of the accident is correct. *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007. See also *Tudor Iron Works v. Weber*, 129 Ill. 535, 21 N. E. 1078; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877.

Or a boot showing the indentations on it as tending to show that the wearer's foot had been run over by a car wheel, and that the brake had not been applied. *Hays v. Gainsville Street R. Co.* 70 Tex. 602, 8 S. W. 491.

And according to *Williams v. Nally*, 20 Ky. L. Rep. 244, 45 S. W. 874, the bones of a fractured leg which had to be amputated may be introduced for inspection by experts, upon the question as to whether the leg was properly treated.

Otherwise, if the inspection is merely an appeal to the feelings and sympathies of the jurors. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (a boot worn by plaintiff when injured).

And *Rost v. Brooklyn Heights R. Co.* 10 App. Div. 477, 41 N. Y. Supp. 1069, holds that the amputated foot of a child cannot be shown to the jury to show the size of the child at the time, where she is present in court at the trial, and defendant admits that the amputation was properly done.

5. — photographs.

On the trial of an issue involving the condition, appearance, or identity of a person,¹ place,² or thing,³ at a previous time, a photograph taken at the time in question is competent upon proper evidence of its fidelity.⁴

Ruloff's Case, 11 Abb. Pr. N. S. 245; less fully as *Ruloff v. People*, 45 N. Y. 213; s. p. *Cowley v. People*, 83 N. Y. 465; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L. R. A. 765, 23 N. E. 35. Thus, a photograph of a child seven years old at the time of its death alleged to have been caused by another's negligence is competent on the question of its physical development, as tending to show probable further development, although it was taken two years before the death of the child. *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868. The fact that it had been taken two years before the death of the child is a circumstance affecting its weight only.

So, also, as to a photograph taken by the cathode or X-ray process, to show the condition of bones as affected by an injury. *Smith v. Grant* (Colo. Dist. Ct.) 29 Chicago Leg. News, 145; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

So held, also, as to copies of photographs of a deceased person sought to be identified, which were recognized by witnesses, well acquainted with him in his lifetime as true likenesses of him. *Wilcox v. Wilcox*, 46 Hun, 32.

Otherwise, however, if the photograph will be of no assistance to the jury, but will rather tend to confuse them. *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Rock Island v. Drost*, 71 Ill. App. 613. And its exhibition is merely calculated to arouse their sympathy. *Selleck v. Janesville* (Wis.) 80 N. W. 944.

So, on an issue of mental or testamentary capacity, a testator's photograph is not admissible, even though shown to fairly represent him. *Varner v. Varner*, 16 Ohio C. C. 386 (error to admit).

And a photograph offered to show physical appearance is properly excluded where direct evidence may be easily obtained. *Gilbert v. West End Street R. Co.* 160 Mass. 403, 36 N. E. 60.

For further cases on the question of the admissibility of photographs of persons, see note to *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 802, 805.

**Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 8 So. 43; *Dyson v. New York & N. E. R. Co.* 57 Conn. 9, 17 Atl. 137; *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44; *Archer v. New York, N. H. & H. R. Co.* 106 N. Y. 589, 13 N. E. 318; *Williams v. Brooklyn Elev. R. Co.* 57 Hun, 591, 10 N. Y. Supp. 929, Reversed on other grounds in 126 N. Y. 96, 26 N. E. 1048; *Warner v. Randolph*, 18 App. Div. 458, 45 N. Y. Supp. 1112; *Cozzens v. Higgins*, 1 Abb. App. Dec. 451; *Beardslee v. Columbia Twp.* 188 Pa. 496, 41 Atl. 617; *Missouri, K. & T. R. Co. v. Moore* (Tex. App.) 15 S. W. 714 (error to exclude); *Dederichs v. Salt Lake City R. Co.* 14 Utah, 137, 35 L. R. A. 802, 46 Pac. 656, and cases cited. But in North Carolina the rule seems to be that photographs may only be used by a witness in connection with and to explain his testimony, and are not admissible as evidence *per se*. See *Hampton v. Norfolk & W. R. Co.* 120 N. C. 534, 35 L. R. A. 809, 27 S. E. 96.

According to *Scott v. New Orleans*, 41 U. S. App. 498, 75 Fed. Rep. 373, 21 C. C. A. 402, the difference between the images produced upon the photographic plate and the retina of the human eye does not affect the admissibility of the photograph; but is merely a circumstance affecting

its weight. But the jury should, by proper instructions, be warned against the liability of such evidence to mislead.

Nor is its admissibility affected by the fact that there has been a change in the condition or appearance of the place since the time in question and before the photograph was taken, due to some action of the party opposing its admission. *Stott v. New York, L. E. & W. R. Co.* 66 Hun, 633, 21 N. Y. Supp. 353. So held in *Beardslee v. Columbia Twp.* 188 Pa. 496, 41 Atl. 617, if the substantial identity of the place be not destroyed, and the changes are pointed out to the jury. *Contra* a photograph taken long after the time in question and after material changes had taken place, from both natural and human causes,—especially where the party offering it has had the benefit of a map of his own making and introduced by him. *Hampton v. Norfolk & W. R. Co.* 120 N. C. 534, 35 L. R. A. 808, 27 S. E. 96.

Otherwise if the photograph be not a true representation of the place. *Threlkeld v. Wabash R. Co.* 68 Mo. App. 127; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367. And its only effect would be to mislead and confuse the jury. *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521.

And a photograph is not admissible if the jury have viewed the premises. *Dobson v. Philadelphia*, 7 Pa. Dist. R. 321. *Contra* if the view, though proper, be impracticable. *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557.

For further cases on the admissibility of photographs of places, see note to *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 802.

²*Turner v. Boston & M. R. Co.* 158 Mass. 261, 33 N. E. 520; *Wurmser v. Frederick*, 62 Mo. App. 634; *Conrad v. Richter*, 13 Pa. Co. Ct. 478; *Chestnut Hill & S. H. Turnp. Co. v. Piper*, 15 W. N. C. 55.

⁴The court will not judicially notice the fidelity of a photograph offered in evidence; but that fact must be established by proper evidence. *Varner v. Varner*, 16 Ohio C. C. 386, and cases cited; *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433; *Beardslee v. Columbia Twp.* 188 Pa. 496, 41 Atl. 617, and cases in note to *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 803.

And while it is usually the better practice to verify the fidelity of a photograph by testimony of the photographer who took it, it is not absolutely necessary that it be so verified. *Roosevelt Hospital v. New York Elev. R. Co.* 66 Hun, 633, 21 N. Y. Supp. 205, 206. But it may be verified by any person of equally correct vision and powers of observation who is familiar with the object photographed. *Roosevelt Hospital v. New York Elev. R. Co. supra*; *Nies v. Broadhead*, 75 Hun, 255, 27 N. Y. Supp. 52.

6. View; statute.

The right to send the jury out to have a view, although of common-law origin,¹ is now generally regulated by statute,² though it may be done with the consent of the parties.³

¹While it is uncertain when a view by the jury would be granted or refused at common-law, the prevailing opinion seemed to be that views were sanctioned by the common-law practice, although allowed only in cer-

tain real actions. The view was not a matter of right, however, but proceeded upon the opinion of the judge as to its propriety and necessity. See *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, and cases in note to *People v. Thorn* (N. Y.) 42 L. R. A. 368. And in *Newham v. Taite*, 6 Scott, 575, 1 Arn. 244, the court refused a view, saying it had difficulty in seeing how the rule could be enforced if granted.

And a statute making it obligatory on a court to permit a jury in eminent domain proceedings to view the premises on application of either party was held, in *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, not to preclude the common-law power of the court in other cases to permit a view in its discretion.

In *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193, the practice is characterized as one not to be encouraged and as "most usually unnecessary for any good purpose, . . . productive of delay and expense, and, on occasions, possibly, of irregularities," though it is held discretionary with the trial judge to grant or refuse the view; and should be refused if a map of the locality and evidence of witnesses are sufficient to convey to the jury an intelligent comprehension of the issues.

²Under the general form of statutes authorizing a view whenever, in the opinion of the judge, it is proper for the jury to have a view, it is usually allowed in any kind of action, without reference to the subject-matter. *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328. But it is not a matter of right, the application being discretionary with the trial judge. *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23. The question being whether the view is proper and necessary. See also cases cited in notes to *People v. Thorn* (N. Y.) 42 L. R. A. 370; and *Springer v. Chicago* (Ill.) 12 L. R. A. 611. See also the next succeeding section.

And statutes apparently designed for other purposes have been held to authorize views by the jury. Thus, in Illinois the court, in a proceeding providing that in cases of this character the hearing shall be conducted to confirm a special assessment, may, in its discretion, under a statute as any other case at law, order a view of the *locus in quo* by the jury. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901. And according to *Traut v. New York, C. & St. L. R. Co.* (Pa.) 15 Atl. 678, a statute giving the court to which an appeal from the report of reviewers is taken power to order what notices shall be given, connected with any part of the proceedings, and to make all such orders connected therewith as may be deemed requisite, authorizes an order in eminent domain proceedings directing the jury to view the premises after they are impaneled and sworn.

There is express statutory authority for views in some particular classes of cases. Thus, in New York a view by the jury in actions of waste is provided for in N. Y. Code Civ. Proc. § 1659.

Whether the United States courts must follow the state practice on applications for view does not appear to have been settled. If it were a mode of taking evidence the state practice would not be applicable (see *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724), but doubtless it still might be allowed on consent, though consent would

not make it matter of right. Considered as simply qualifying the jury to understand the evidence, the question whether the state practice controls in the United States courts depends on the application of the distinction in *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286. *Owens v. Missouri P. R. Co.* 38 Fed. Rep. 571, did not involve this question, but merely held that permitting the jury in an action for damages for personal injuries caused by a collision with a locomotive to examine a railroad engine, though against the objection of the defendant, was not a ground for a new trial where, in reaching a verdict, the jury had to decide for themselves whether the person was struck by the engine and how he came to be struck, and whether he was walking or lying down on the track when he was struck.

When view is allowed, they follow the state practice as to expenses. *Huntress v. Epson*, 15 Fed. Rep. 732.

¹*Milledgeville v. Brown*, 87 Ga. 599, 13 S. E. 638 (where no question was made as to the duty or power of the court, because the view was had by consent of both parties).

7. — discretion of court.

It is not a matter of right, however, but the application, whether under the practice at common law or under the statutes, is addressed to the discretion of the trial judge,¹ and may be granted by him if he deems it proper and necessary.²

¹*Saint v. Guerrerio*, 17 Colo. 448, 30 Pac. 335; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514; *Jackson County Comrs. v. Nichols*, 139 Ind. 611, 38 N. E. 526; *Banning v. Chicago, R. I. & P. R. Co.* 89 Iowa, 74, 56 N. W. 277; *Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639; *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *Brown v. Kohout*, 61 Minn. 113, 63 N. W. 248; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193; *Rudolph v. Pennsylvania S. Valley R. Co.* 186 Pa. 541, 40 Atl. 1083; *Bellingham Bay & B. C. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 14 S. E. 465; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23.

²The court must always determine from the peculiar facts in each case as to whether it is necessary and proper for the jury to have a view to enable them to reach a just decision. *Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639. And its decision will not be disturbed on appeal, unless it clearly appears that the view was necessary and practicable, and that its denial probably injured the party applying. *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 14 S. E. 465.

And a view is properly refused where the conditions existing at the time in question have changed materially. *Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *Stewart v. Cincinnati, W. & M. R. Co.* 89 Mich. 315, 17 L. R. A. 539, 50 N. W. 852. Or the facts involved are of such a character that they can be accurately described to the jury. *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428. See further, as to the discretion of the court, cases cited in note to *People v. Thorn* (N. Y.) 42 L. R. A. 372.

8. — object.

Whether a view when had is merely to enable the jury to understand the evidence, or is to be also a source of additional evidence, is a disputed question.¹

¹There seem to be three different lines of authorities. According to one view what the jury may observe when sent out to view the premises in dispute can, under no circumstances, become evidence, nor can the jury take it into consideration otherwise than as affording them means to better understand and apply the evidence adduced. *Lanin v. Chicago, W. & N. R. Co.* 33 Fed. Rep. 415; *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324; *Wright v. Carpenter*, 49 Cal. 607; *Close v. Samm*, 27 Iowa, 503.

Hence it is error to instruct the jury that they are to take into consideration their personal examination, like the evidence. *Wright v. Carpenter*, 49 Cal. 607; *Close v. Samm*, 27 Iowa, 503.

Where referees, upon the trial, inspected premises (in the presence of counsel) and based their findings upon the proofs and such view,—*Held*, that if such inspection was additional ocular evidence it must appear in the case on appeal, or the appellate court could not regard it in determining whether the findings were justified by the evidence. *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, Reversing 11 Jones & S. 1; Compare *Marted v. Seymour*, 56 Mich. 129, 22 N. W. 219; *Omaha & R. Valley R. Co. v. Walker*, 17 Neb. 432, 23 N. W. 348.

According to another line, what may perhaps be termed "mute" evidence may be used by the jury in reaching their conclusion like any other evidence offered, and under some circumstances it may even be taken as determinative of the dispute, to the exclusion of the oral evidence. *Rock Island & P. R. Co. v. Leisy Brewing Co.* 174 Ill. 547, 51 N. E. 572; *Chicago, K. & W. R. Co. v. Willits*, 45 Kan. 110, 25 Pac. 576.

Still other authorities, taking the middle ground, permit the jury to use their observations as evidence, but not as preponderating, and in order to uphold the verdict as supported by the evidence the conclusions of the jury must, measurably at least, be supported by what actually appears in the record. *Topeka v. Martineau*, 42 Kan. 387, 5 L. R. A. 775, 22 Pac. 419; *Detroit v. Detroit, G. H. & M. R. Co.* 112 Mich. 304, 70 N. W. 573; *Bigelow v. Draper*, 6 N. Dak. 152, 69 N. W. 570.

According to *Denver, T. & Ft. W. R. Co. v. Pulaski Irrig. Ditch Co.* 11 Colo. App. 41, 52 Pac. 224, the jury should be told that they are to use what they see to aid them in understanding the testimony, and unless the fact be an absolute physical one which is evident to the eye, and not dependent upon any other consideration or any other proof, they must not use it as against the testimony offered and base their verdict on their own judgment other than the exact fact seen by them. It was held in that case, however, that allowing them to consider what they had observed just as they consider the testimony of the witnesses was not so inherently and fatally vicious as to require reversal if in fact there was abundant evidence, aside from that acquired by observation at the view, to sustain the verdict.

For a comprehensive discussion of the cases illustrative of the three phases of this question and suggesting an explanation of the apparent conflict, see note to *People v. Thorn* (N. Y.) 42 L. R. A. 385.

9. — application.

It is not error to allow counsel, in arguing his application for a view, to state to the judge in the hearing of the jury what they will see.¹

¹*Boardman v. Westchester F. Ins. Co.* 54 Wis. 364, 11 N. W. 417.

In Pennsylvania it is held necessary to move before trial. *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42.

But participating without objection waives the omission of previous motion. *Brown v. O'Brien*, 3 Clark (Pa.) 115.

10. — vacating order.

The court may vacate a previous order for a view upon its appearing unnecessary.¹

¹*Nesbit v. Kerr*, 3 Yeates, 194.

11. — time.

The time when the jury shall take the view, if it be allowed, is in the discretion of the court.¹

¹*Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494; *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367. See, also, cases cited in note to *People v. Thorn* (N. Y.) 42 L. R. A. 375.

12. — mode.

If a view is demanded in a proper case the jury should be sent in a body, in charge of a sworn officer.¹

¹*Brooklyn v. Patchen*, 8 Wend. 47, 65, 84, Affirming 2 Wend. 377, 384.

The omission of the court to cause the officers in charge of the jury to take the statutory oath is an irregularity only, and may be waived by defendant. *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684. As to the attendance, supervision, and conduct of jury while out on a view, see note to *People v. Thorn* (N. Y.) 42 L. R. A. 377.

A request for the judge to participate in a view with the jury must be made before a motion for a view is decided; otherwise the failure of the judge to make the view will not be available as error. *Mori v. Larsen*, 70 Wis. 569, 36 N. W. 331. See further, as to the necessity of the presence of the judge, note to *People v. Thorn* (N. Y.) 42 L. R. A. 381.

13. — experiment.

It is not matter of right to have an experiment tried in the presence of the jury, upon the ground viewed.¹

¹*Smith v. St. Paul City R. Co.* 32 Minn. 1, 18 N. W. 827; *Moore v. Chicago, St. P. & K. C. R. Co.* 93 Iowa, 484, 61 N. W. 992 (reversible error to permit, although a verdict is directed by the court upon the evidence without regard to such proceeding). But allowing it by consent is not error. *Stockwell v. Chicago, C. & D. R. Co.* 43 Iowa, 470. See also cases cited in note to *People v. Thorn* (N. Y.) 42 L. R. A. 383, 384.

14. — unauthorized view.

Misconduct of a juror in going to take a view is waived, if objection to continuing the trial before him is not promptly made, on discovery of the fact.¹

¹*Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.* 57 Fed. Rep. 898; *Stampofski v. Steffens*, 79 Ill. 303; *Shelbyville v. Brant*, 61 Ill. App. 153; *Easley v. Missouri P. R. Co.* 113 Mo. 236, 20 S. W. 1073; *Whitcher v. Peacham*, 52 Vt. 242. See further, on the question of unauthorized views, note to *People v. Thorn* (N. Y.) 42 L. R. A. 394 *et seq.*

15. Experiments.

The court may allow experiments or demonstrations to be made in the presence of the jury, if they are made under similar conditions and like circumstances to those existing at the time of the thing sought to be demonstrated,¹ or if the question is within the range of ordinary knowledge or experience.²

¹*Leonard v. Southern P. Co.* 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887, and cases cited; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938. See also 15 L. R. A. 221, note.

But this does not mean that a witness should be allowed to illustrate to the jury the manner in which, *in his opinion*, an accident happened, which he did not himself see. *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543.

²Thus, where plaintiff claimed to be paralyzed by a fall, her medical attendant, though not sworn, may demonstrate her loss of feeling by thrusting a pin into the side said to be paralyzed. *Osborne v. Detroit*, 32 Fed. Rep. 36. See also cases cited in note to *Leonard v. Southern P. Co.* (Or.) 15 L. R. A. 221.

XV.—USEFUL AUTHORITIES ON EVIDENCE.

[Under this heading, without undertaking to state the law fully, I have briefed a selection of what I deem the most useful authorities on those questions of evidence which are most frequently contested, and are not so trite but that ready reference to authority is often indispensable to correct practice at Circuit.]

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2. Acknowledgment.
3. Admissions.
4. —of what witness would prove.
5. —by counsel.
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7. Affidavits.
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59. Interrogating to discover other witnesses.
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66. Letter book.
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69. Memorandum.
70. Memory of one witness aided by another.
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74. Notary's seal.
75. Official act.
76. Opinions.
77. Oral to vary.
78. Pedigree.
79. Reason for positiveness.
80. Receipt.
81. Reference to a third person.
82. Relevancy.
83. Remote evidence.
84. Res gestæ.
85. Statute of frauds.
86. Stenographer's minutes.
87. Stipulation as to facts.
88. — relief against.
89. Subscribing witness to prove execution.
90. Tampering.
91. Telegrams.
92. Telephone.
93. Trust.
94. United States courts.
95. Usage.
96. Value and damage.

1. Accounts.

Account books of a party, the entries in which are testified to be correct by the persons who made them, are competent in his own favor.¹

¹*Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

Entries made by private parties are not admissible in evidence, unless they were made contemporaneously with the facts to which they relate, by parties having personal knowledge of the facts, and are corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, insane, or beyond reach.¹

¹*Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908. And see *Maxwell v. Wilkinson*, 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691, and cases cited; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440, 9 Hun, 239.

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination.¹

¹Greenl. Ev. § 93, applied in *Burton v. Driggs*, 20 Wall. 125, 22 L. ed. 299.

The state of the account and the balance due at a given time, when collaterally involved, are provable by the testimony of the person in whose books it was, without production of the books.¹

¹*Lewis v. Palmer*, 28 N. Y. 271, 278.
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When complex transactions are already in evidence statements made by experts of the result of the account, upon the several theories of the law which the case may be subject to, are competent, not necessarily as evidence of the facts stated in them, but to assist the jury in calculation.¹

¹*Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 547, 23 L. ed. 868, 870.

It is not error to refuse to allow a witness with the books before him to give a summary of their contents.¹

¹*Von Sachs v. Kretz*, 72 N. Y. 548, Affirming 10 Hun, 95.

Entries in books are always explainable, and the truth of the transaction can be shown independently of them.¹

¹*The Patapsco*, 13 Wall. 329, *sub nom. The Patapsco v. Boyce*, 20 L. ed. 696; *s. p. Foster v. Persch*, 68 N. Y. 400, Reversing 6 Daly, 164.

2. Acknowledgment.

What defects in an acknowledgment preclude its admission in evidence.¹

¹15 Abb. N. C. 269, note; 14 Abb. N. C. 453, note. And see *Authentication of an act, infra*, § 11.

3. Admissions.

The rule that what a party has said about his case may always be proved against him does not let in what he has said merely in the way of repetition of the sayings of others.¹

¹*Stephens v. Vroman*, 16 N. Y. 381.

4. — of what witness would prove.

An admission of the facts proposed to be proved by an absent witness is conclusive evidence against the party who prevented postponement thereby, if it be read to the jury as a part of the evidence on the trial; otherwise it cannot be considered by them.¹

¹*Pannell v. State*, 29 Ga. 681; *Lowrie v. Verner*, 3 Watts, 317.

An admission that a witness, if present, would testify to specified statements, is not conclusive, either as to the competency of the witness, or the admissibility or the truth of the testimony.¹

¹*State v. Geddis*. 42 Iowa, 264; *Edmonds v. State*, 34 Ark. 720.

Nor is a consent of an adverse party, that such a statement be read to the jury, conclusive as to the truth of the statement.¹

¹*Burton v. Brooks*, 25 Ark. 215.

5. — by counsel.

A formal admission of a material fact,¹ made by counsel in the course of the trial of the issues,² for the purpose of influencing the course of the trial,³ is conclusive upon the client⁴ for the purposes of the trial⁵ and countervails a contrary allegation or denial in his pleading, but does not supply the lack of an essential allegation or denial in either his or his adversary's pleading.⁶

¹For instance, the amount due. *Wilson v. Spring*, 64 Ill. 14. Or the fact of partnership. *Oliver v. Bennett*, 65 N. Y. 559. An admission of the law does not necessarily bind the client. *Mitchell v. Cotton*, 3 Fla. 134. Nor does an admission that a prima facie case exists. *Spaulding v. Hood*, 8 Cush. 602.

²An admission of what an absent witness would prove, made before swearing the jury, even though made in their presence, is not enough. It should be presented as part of the evidence. *Lowrie v. Verner*, 3 Watts, 317.

³Usually, it must have been made for the purpose of dispensing with formal proof. *Treadway v. Sioux City & St. P. R. Co.* 40 Iowa, 526; *Starke v. Keenan*, 11 Ala. 818.

But an admission made even in the opening, not for the purpose of dispensing with proof by the adversary, but as an avowal of inability or a disavowal of intention to prove, is enough. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541.

Admissions before trial may be proved (See *Smith v. Dixon*, 3 Met. (Ky.) 438), their effect depending on circumstances.

⁴Even though she be a married woman. *Wilson v. Spring*, 64 Ill. 14. As to clients who are *non sui juris*, query. "When the rights of infants are in question, the facts cannot be established by admissions (Cooley, J., in partition). *Claxton v. Claxton*, 56 Mich. 557, 23 N. W. 310.

According to *Mitchell v. Cotton*, 3 Fla. 134, it is necessary that the client be present. The rule is qualified by the like intimation in *Colledge v. Horn*, 3 Bing. 119; but according to Lord Ellenborough, in *Young v. Wright*, 1 Campb. 139, the authority of attorney or counsel is presumed, and this we take to be the generally recognized rule.

⁵*Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541; *Stanley v. Northwestern Mut. L. Ins. Co.* (Ind. Nov. 23, 1883), 13 Ins. L. J. 347, 353 (95 Ind. 254, appears to be a different decision); *Thompson v. Thompson*, 9 Ind. 323; *Boston & W. R. Co. v. Dana*, 1 Gray, 83. And see *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550. It may affect other trials, if in writing. *Mullin v. Vermont Mut. F. Ins. Co.* 56 Vt. 39.

⁶*Jackson v. Whedon*, 1 E. D. Smith, 141.

The court may relieve the party from an admission made by his attorney or counsel on the trial, if proper explanation be made.¹

¹*Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541; s. p. *Behr v. Connecticut Mut. L. Ins. Co.* 4 Fed. Rep. 357. But see *People v. Garcia*, 25 Cal. 531, where it was held not error to refuse to do so. Compare *Lewis v. Sumner*, 13 Met. 269.

6. — of fact during settlement.

Admission of a distinct fact, though made in the course of a negotiation for settlement, is competent.¹

¹*Bartlett v. Tarbox*, 1 Abb. App. Dec. 120.

It is not admissible if the statement cannot be separated from the offer and still convey the intended idea.¹

¹*Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868.

7. Affidavits.

Affidavits used by the party in the same cause are not necessarily conclusive as evidence against him on the trial.¹

An affidavit made by the party is conclusive evidence against him in a matter founded upon the proceeding sought to be contradicted or growing out of the adjudication obtained in reliance upon the affidavit, or if it has been acted on by the other party so as to raise an estoppel; otherwise it does not necessarily conclude him.²

Affidavits which have been used against a party on a former motion are not made admissible in evidence on the trial by the mere fact that he did not make an affidavit in contradiction.³

An affidavit of a party in his own favor is not made admissible by the mere fact that he has put in evidence the counter affidavit of his adversary.⁴

¹*Mather v. Parsons*, 32 Hun, 338.

²*Maybee v. Sniffen*, 2 E. D. Smith, 1, 12, 14.

³*Wehrkamp v. Willet*, 4 Abb. App. Dec. 548, 555.

⁴*Degraff v. Hovey*, 16 Abb. Pr. 120.

8. Agency.

The admissions and declarations of an agent are not evidence of his agency unless brought home to the alleged principal.¹

¹*Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276; *Stringham v. St. Nicholas Ins. Co.* 4 Abb. App. Dec. 315.

But the court may, in its discretion, admit the declarations, on assurance that evidence of the agency will afterward be given.¹

¹*First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283.

Agency cannot be shown by appearances, except in favor of one who relied on them.¹

¹*People v. Bank of North America*, 75 N. Y. 547.

Distinction between conditional authority and absolute authority, subject to limitations peculiarly within the agent's knowledge.¹

¹*Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159.

9. Attorney's interest.

Evidence that plaintiff has agreed to give his attorney a part of the recovery is incompetent.¹

¹*Sussdorff v. Schmidt*, 55 N. Y. 319; *Courtright v. Burns*, 14 Cent. L. J. 89 (opinion by McCrary, J.).

If the attorney is a witness such evidence is competent on his credibility, and he may be required to answer.¹

¹*Moats v. Rymer*, 18 W. Va. 642.

10. Alternative claims.

Where a party claims premises by two titles, either of which is good, if available, he should be permitted to introduce evidence of both.¹

¹*Enders v. Sternbergh*, 2 Abb. App. Dec. 31 (holding that where a party, having proved title by deed, offered evidence of title to the same property by will, it was error to refuse to admit it, even though the title by deed was uncontroverted).

11. Authentication of an act.

An official authentication of an act, if not necessary to its validity, but simply to facilitate its proof, is not objectionable because made after the action was commenced.¹

¹For instance, an acknowledgment of a deed. *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616. Or the seal on letters of administration. *Maloney v. Woodin*, 11 Hun, 202.

Thus the formal entry of an order of court, as actually declared, may be made at any time when necessary for purposes of evidence.¹

¹*People v. Myers*, 2 Hun, 6. In *Seeley v. Morgan*, 17 Jones & S. 346, this principle was extended to the case of a corporate resolution adopted pending the trial, to evidence a ratification claimed to have been given before the action (reviewing cases).

12. Best and secondary evidence.

The existence of an instrument and the existence of the relation under it may be proved by parol, without producing the instrument.¹

¹*Sprague v. Hosmer*, 82 N. Y. 466, 471.

Contents of a notice may be proved by secondary evidence without giving notice to produce.¹

¹*Eagle Bank v. Chapin*, 3 Pick. 180, 183.

Original papers are not made merely secondary evidence by record, pursuant to a statute requiring them to be filed or recorded.¹

¹*Chapman v. Gates*, 54 N. Y. 132 (county judge's order in highway proceedings); *Haddow v. Lundy*, 59 N. Y. 320 (surrogate's minutes).

The rule excluding secondary evidence does not apply to an incidental and collateral matter drawn out on cross-examination to test the temper and credibility of the witness, and in no wise affecting the merits of the controversy between the parties.¹

¹*Klein v. Russell*, 19 Wall. 439, 464, 22 L. ed. 116, 124; *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.

But a paper the contents of which are sought to be used to credit or contradict a witness, as containing his own statements contrary to his testimony, must be produced. A copy will not do.¹

¹*Newcomb v. Griswold*, 24 N. Y. 298; *Pratt v. Norton*, 5 Thomp. & C. 8 (a certified copy assignment in bankruptcy), s. p. *Nash v. Hunt*, 116 Mass. 237, 248 (a copy pleading).

The fact that a document is without the state is enough to let in secondary evidence without notice to produce.¹

¹*Burton v. Driggs*, 20 Wall. 125, 134, 22 L. ed. 299, 302; *Bronson v. Tut-hill*, 1 Abb. App. Dec. 206 (*dictum*).

The absence without the state, of the instrument on which the action is brought, is not an excuse for plaintiff's failure to produce it.¹

¹*Skillito v. Robbins*, 7 Ohio L. J. 74, citing *Van Alstyne v. National Commercial Bank*, 4 Abb. App. Dec. 449.

13. — foundation for secondary—loss.

To lay a foundation for secondary evidence of the contents of a lost paper, the person last known to have had possession of it must be examined as a witness to prove its loss; and even if he is out of the state his deposition must be taken or excuse shown.¹

¹*Kearney v. New York*, 92 N. Y. 617.

14. — notice to produce.

Notice to produce is not necessary in case of a writing directly involved in the cause of action or defense, so that the nature of the action or the contents of the pleading in effect give notice that it will be required.¹

¹*Howell v. Huyck*, 2 Abb. App. Dec. 423; *Lawson v. Bachman*, 81 N. Y. 616, Reversing 12 Jones & S. 396.

15. — — sufficiency.

A notice to produce is to be deemed sufficient if it fairly apprise the party of the paper wanted, though it be informal and inaccurate in particulars.¹

¹*Frank v. Manny*, 2 Daly, 92; *Jones v. Parker*, 20 N. H. 31; *United States v. Duff*, 6 Fed. Rep. 45.

16. — quality of secondary evidence—of lost document.

Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with all the formalities required by law, and should show all the contents, not literally, but substantially.¹

¹*Edwards v. Noyes*, 65 N. Y. 125.

17. — — of suppressed document.

Parol evidence to establish the contents of an instrument which the adverse party refuses to produce on notice is competent, although vague and indistinct.¹

¹*Benjamin v. Ellinger*, 80 Ky. 472.

18. — — of formal document.

Where the instrument is a familiar legal form,—e. g., a judgment roll or execution,—it may be presumed to have been adequate to sustain the official acts by which its existence is proved.¹

¹*Mandeville v. Reynolds*, 68 N. Y. 528, 536, Affirming 5 Hun, 338.

19. — secondary not rebuttable.

He who, by refusing to produce, lets in secondary evidence, cannot contradict it by parol.¹

¹*Bogart v. Brown*, 5 Pick. 18. Where, in an action between partners, the defendants, having the books, refused, on notice, to produce them and put plaintiff to secondary proof,—Held, that on rebuttal defendants could not contradict that proof, and the judgment was affirmed by the court of appeals after argument on this point. Mem. in *Platt v. Platt*, 58 N. Y. 646, 649.

20. — destruction.

The general rule that a party is precluded from proving the contents of a writing by the fact that he destroyed it voluntarily¹ does not apply if it was destroyed by mistake² or according to his custom, without fraudulent intent, and before any difference had arisen respecting it.³

¹*Blade v. Nolan*, 12 Wend. 173; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166; *Broadwell v. Stiles*, 8 N. J. L. 58.

²*Riggs v. Tayloe*, 9 Wheat. 483, 6 L. ed. 140.

³*Steele v. Lord*, 70 N. Y. 280, 26 Am. Rep. 602.

21. Bill of particulars—as limiting evidence.

A bill of particulars, even though voluntarily served,¹ has the effect to restrict the proof to the matters set forth in it.²

¹*Payne v. Smith*, 19 Wend. 122.

²*Bowman v. Earle*, 3 Duer, 691.

An order to exclude proof for failure to serve a sufficient bill of particulars must be obtained before trial, to make exclusion a matter of right.¹

¹*Whitehall & P. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34; s. p. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 564, 9 L. ed. 222, 231.

Without an order to exclude proof, the judge may, in his discretion, exclude proof for noncompliance with an order for a bill of particulars.¹

¹*Bank of United States v. Lyman*, 20 Vt. 666, 1 Blatchf. 297, Fed. Cas. No. 924.

22. — amending.

Bill of particulars, amendable like a pleading.¹

¹*Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235; *Melvin v. Wood*, 4 Abb. Pr. N. S. 438.

23. Books of science—inductive science.

Statements made in books of inductive science, such as standard medical works, are not competent evidence for any purpose.¹

¹United States courts—*Union P. R. Co. v. Yates*, 49 U. S. App. 241, 79 Fed. Rep. 584, 40 L. R. A. 553, 25 C. C. A. 103 (where medical books are held not competent as independent evidence of the opinions and theories therein expressed or advocated).

California—*Gallagher v. Market Street R. Co.* 67 Cal. 13, 6 Pac. 869.

Illinois—*North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340 (book on mechanics).

Indiana—*Cory v. Silcox*, 6 Ind. 39 (sanctioning use as argument only).

Iowa—*Brodhead v. Wiltse*, 35 Iowa, 429 (special statute which may admit them).

Kentucky—Said to have been the practice in some lower courts to receive them. 2 Ky. L. Rep. & J. 64.

Maine—*Ware v. Ware*, 8 Me. 42.

Maryland—*Davis v. State*, 38 Md. 15.

Massachusetts—*Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178 (leading case).

Michigan—*Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 669.

New York—*Harris v. Panama R. Co.* 3 Bosw. 7, 18.

North Carolina—*Huffman v. Click*, 77 N. C. 55.

Texas—*Fowler v. Lewis*, 25 Tex. Supp. 380; cited in 1 Meyer's Dig. 374. (The Texas case often cited to the contrary, *Wade v. DeWitt*, 20 Tex. 398, seems to rest on the fact reasonably inferable from the report, that counsel sought to use the extract as argument merely, not as stating facts).

Wisconsin—*Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827.

Contra, *State v. Hoyt*, 46 Conn. 333 (but this case can best be sustained as exceptional and turning on surprise in excluding what had been before permitted).

The reason is, "they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination." *Ashworth v. Kittridge*, 12 Cush. 193 (Shaw, Ch. J.).

See also note to *Western Assur. Co. v. J. H. Mohlman Co.* (C. C. A. 2d C.) 40 L. R. A. 561, for exhaustive collection of cases on this question.

A statute making books of science or art presumptive evidence of facts of general notoriety or interest does not include medical works so as to make them evidence of the opinions or theories therein expressed or advocated.¹

¹*Union P. R. Co. v. Yates*, 49 U. S. App. 241, 40 L. R. A. 553, 79 Fed. Rep. 584, 25 C. C. A. 103.

A Federal court is not bound to follow the state court decision as to the admissibility in evidence at common law, of extracts from medical works.¹

¹*Union P. R. Co. v. Yates*, 49 U. S. App. 241, 40 L. R. A. 553, 79 Fed. Rep. 584, 25 C. C. A. 103, and cases cited.

24. — exact science.

Books of exact science or mathematical calculations,—such as the Northampton tables and the like,—recognized by the court as such, or shown to be such by the testimony of a qualified witness, may be read in evidence.¹

¹*Abbott*, Tr. Ev. 724, 22 Am. L. Reg. 105, note, 59 Am. Dec. 185 note; s. p. *Huffman v. Click*, 77 N. C. 55, 58.

The contrary held of a book on mechanics, in *North Chicago Rolling Mill v. Monka*, 107 Ill. 340.

See, also, note to *Union P. R. Co. v. Yates* (C. C. A. 8th C.) 40 L. R. A. 553.

25. — of history, etc.

A book published in this country by a private person is not competent evidence, against a stranger to it, of facts stated therein of recent occurrence, and which might be proved by living witnesses or other better evidence.¹

¹*Whiton v. Albany City Ins. Co.* 109 Mass. 24, 31; *Morris v. Harmer*, 7 Pet. 554, 8 L. ed. 781; *Fuller v. Princeton*, 2 Dane, Abr. 334.

Otherwise by special statute. See *Gallagher v. Market Street R. Co.* 67 Cal. 13, 6 Pac. 869; *Kuhns v. Chicago, M. & St. P. R. Co.* 65 Iowa, 528. 22 N. W. 661.

Almanac admissible to show time of rising of moon.¹

¹*Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414; *State v. Morris*, 47 Conn. 179 (justifying it rather as refreshing memory in aid of judicial notice). See also note to *Union P. R. Co. v. Yates* (C. C. A. 8th C.) 40 L. R. A. 560.

26. Burden of proof.

The test as to "the burden of proof" as to any point, when the phrase is used respecting the order of proof in adducing evidence, is. Which party would be unsuccessful if no evidence at all, or no more than has already been received, were to be offered?¹

¹1 Phil. Ev. 812; 1 Taylor, Ev. 369, § 338.

This subject is well discussed in *Abrath v. North Eastern R. Co.* (Eng.

Ct. App. June, 1883), 32 Week. Rep. 50. It is not usually safe to ask the court, under the same circumstances, to instruct the jury that the burden has shifted. See *post*, Division XXI. *The Instructions* See also *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 281, 7 Am. Rep. 327, Reversing 2 Daly, 454; *Heinemann v. Heard*, 62 N. Y. 448, *Banker v. Banker*, 63 N. Y. 409.

27. — as to negative.

In general, whichever party asserts a right must substantiate it and, if the right is dependent upon the existence of a negative, must establish the truth of the negative by a preponderance of proof, unless excused by the fact that the matter is peculiarly within the knowledge of the adverse party.¹ But a party is not required to prove the negative of any matter where the existence of the contrary affirmative is necessary to exempt or discharge the adversary from a duty or liability already proved upon him.² He who makes a negative allegation involving a charge of illegality, against which there is a presumption of innocence, must prove the negative.³

¹ Whart. Ev. § 357; 1 Greenl. Ev. § 78; 1 Taylor, Ev. 379, § 347; *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144, with note, where the application of the rule to a great variety of cases is illustrated.

There are two classes of negatives: definite or specific, and indefinite and universal. An averment that the contract was not performed on a day specified is a definite negative, and it is not objectionable to require proof of a definite negative. An averment that the contract was never performed is indefinite or universal, and it is only of negatives of this class that it is unreasonable to require proof.

² Stark. Ev. 589; *Elkin v. Jansen*, 13 Mees. & W. 655, 662, 14 L. J. Exch. N. S. 201, 9 Jur. 353; *Com. v. Thurlow*, 24 Pick. 374, 381.

"The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into." Stephen, Dig. Ev. art. 96; *United States v. Southern Col. Coal, etc., Co.* 1 West. Coast Rep. 11.

³ *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242, 25 How. Pr. 495, Affirming 30 Barb. 588.

28. — as to fact peculiarly within the knowledge of one party.

Where the subject-matter of an allegation is such as to lie peculiarly within the knowledge of the adversary, the burden is on him to give evidence respecting it.¹

¹ Taylor, Ev. § 347, 1 Whart. Ev. § 367; *Rugely v. Gill*, 15 La. Ann. 509. And see *Bowman v. McElroy*, 15 La. Ann. 663; *Corwin v. Shoup*, 76 Ill. 246; *Haley v. Lacy*, 1 Swan, 498; *Burton v. Blin*, 23 Vt. 152.

In *Smith v. New York C. R. Co.* 43 Barb. 229, Johnson, J., states the rule

thus: "If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." Citing 1 Greenl. Ev. § 79, 1 Stark. Ev. 362, 365; Wills, Circumstantial Ev. 183, 184. This applies, he says, in all civil cases. But if understood to justify instructing the jury as to the burden of proof, this statement of the rule is too broad. See reversal in 46 N. Y. 271, 281, 7 Am. Rep. 327, of the decision in *Lamb v. Camden & A. R. & Transp. Co.* 2 Daly, 454, where, at page 463, Judge Johnson's opinion was quoted and erroneously applied to sustain instructions to the jury.

29. — a legal presumption shifts the burden.

A presumption of law arising from evidence already given or from the pleadings, is sufficient to cast the burden of proof on the other party, to show (if the presumption be disputable) that the fact was otherwise than according to the presumption.¹

¹But it will not do to ask the court to instruct the jury that the burden of proof is shifted, unless the presumption is one of law and the instruction is qualified by the condition that the evidence is believed by the jury. For when the burden of proof is said to shift, all that is meant is that the party from whom it is shifted has a right to go to the jury that they may say whether he has fulfilled his obligation to prove his case, unless the other party takes up the burden of adducing evidence and gives proofs.

30. Corporate agent's declarations.

The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.¹

¹Abbott, Tr. Ev. 44; *Xenia Bank v. Stewart*, 114 U. S. 224, 229, 29 L. ed. 101, 103, 5 Sup. Ct. Rep. 845. See also note to *Ohio & M. R. Co. v. Stein* (Ind.) 19 L. R. A. 733.

31. — deed.

Where the common seal of a corporation appears to be affixed to an instrument, and the signature of the proper officer is proved, there is a legal presumption that the officer did not exceed his authority, and the contrary must be proved by the objecting party.¹

¹*Canandarqua Academy v. McKechnie*, 90 N. Y. 618; s. p. *Belden v. Meeker*, 47 N. Y. 307.

32. Date.

The date of a document is *prima facie* evidence of the time when it was written.¹

¹*Livingston v. Arnoux*, 56 N. Y. 507, 519, Affirming 15 Abb. Pr. N. S. 158.

The date of a private instrument unauthenticated is not alone presumptive evidence of the time the document was written, as against a stranger to it, when its competency depends on the time it was written.¹

¹*Foster v. Beals*, 21 N. Y. 247, 250.

33. Deposition—right to read.

An objection to the reading of a deposition, on the ground of an irregularity or defect which might have been obviated by retaking it, cannot be raised at the trial, unless noted when the deposition is taken, or presented by a motion to suppress before the trial is begun.¹

¹*Doane v. Glenn*, 21 Wall. 33, 22 L. ed. 476, and cases cited; *Hebbard v. Haughian*, 70 N. Y. 54; *Fassin v. Hubbard*, 55 N. Y. 465; *Wright v. Cabot*, 89 N. Y. 570.

So, also, of the refusal of a witness to answer proper questions. *Strum v. Atlantic Mut. Ins. Co.* 63 N. Y. 77.

As to documents annexed to deposition, see *Kelley v. Weber*, 9 Abb. N. C. 65, note. And as to right to read a deposition taken in another cause than the one on trial, see note to *Fearn v. West Jersey Ferry Co.* (Pa.) 13 L. R. A. 366.

A deposition taken conditionally within the state cannot be read if the personal attendance of the witness can be secured; one taken without the state can be read, notwithstanding the presence of the witness, unless it has been suppressed by order on special motion.¹

¹*Hedges v. Williams*, 33 Hun, 546.

To show inability to have witness present, the fact of letters having been received from him from places without the state, shortly before the trial, is competent.¹ So are his declarations, in response to inquiry for the purpose, that he is too unwell to attend.²

¹*Carman v. Kelly*, 5 Hun, 283.

²*McArthur v. Soule*, 5 Hun, 63.

34. — reading part.

He who causes a deposition to be taken, even though it be his own testimony, may read part; but whatever he omits that is relevant and competent may be read by the adverse party.¹

¹*Gellatly v. Lowery*, 6 Bosw. 113. Contra, *Southwark Ins. Co. v. Knight*, 6 Whart. 327.

So, it was held in *Railway Passengers' Assur. Co. v. Warner*, 1 Thomp. & C. addenda, 21, that an adverse party who calls out, by a cross-interrogatory, material evidence, is entitled to have it read, so far as responsive.

35. Document.

Neither proving the signature of an instrument, nor marking it for identification, entitles the adverse party to see it or to cross-examine on it. It is the offer in evidence which has this effect.¹

¹*Stiles v. Allen*, 5 Allen, 320.

If the party proving its execution refuses to show it and allow cross-examination of the witness as to execution, its admission against objection is error.¹

¹*Union Mfg. Co. v. Byington*, 1 Hun, 44, 3 Thomp. & C. 86.

36. — referred to.

A document having been properly received in evidence, another distinctly referred to and recognized in it may be received without further proof of execution.¹

¹*Clark v. Mix*, 15 Conn. 152.

An oral contract having been proved, an instrument referred to in it as containing some of its terms may be received without further proof of its execution.¹

¹*Smith v. New York C. R. Co.* 4 Abb. App. Dec. 262.

37. — producing on notice.

If a party produces a document on notice and offers to prove its genuineness, it is error to allow the party who gave the notice to give secondary evidence of contents of the document called for until the one offered has been received in evidence and submitted to the jury.¹

¹*Stitt v. Huidekoper*, 17 Wall. 384, 397, 21 L. ed. 644, 648.

38. — refusal to produce.

In the courts of the United States, if a party refuses to produce a document at the trial, pursuant to order made on motion before trial, he may be nonsuited, if plaintiff; and a verdict against him may be directed, if defendant.¹

¹United States Rev. Stat. § 724. As to the power in the state courts, see 82 N. Y. 260, and cases cited.

39. — inspecting on notice to produce—admissibility.

If a party obtains and inspects a paper by means of notice to produce, has the one who produced it a right to put it in evidence, if relevant?¹

¹Affirmative—*Clark v. Fletcher*, 1 Allen, 53, 57 (Bigelow, Ch. J.); *Lawrence v. Van Horne*, 1 Cai. 276, 285 (*dictum*); *Wallar v. Stewart*, 4 Cranch, C. C. 532, Fed. Cas. No. 17,108; *Wharam v. Routledge*, 5 Esp. 235; *Wilson v. Bowie*, 1 Car. & P. 10; Stephen, Dig. Ev. art. 138.

The reason assigned for this view is the same which prevents a party who puts a question from excluding from the record a responsive answer because it is not what he wants,—that otherwise a party could gain the advantage, if any, from the inquiry, without any corresponding obligation.

Negative—*Kenny v. Clarkson*, 1 Johns. 385, 394 (*dictum*); *Stalker v. Gaunt*, 12 N. Y. Legal Obs. 124 (*dictum*); *Carr v. Gale*, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

The negative is followed in the New York courts. See *Smith v. Rentz*, 131 N. Y. 169, 15 L. R. A. 138, 30 N. E. 54, and cases cited. See also cases cited in note, 15 L. R. A. 138.

The reason assigned in the reports, for the negative view, is that notice to produce is analogous to a bill of discovery where the answer is not evidence for him who makes it, and that to hold the document admissible would tend to drive parties into equity for discovery.

A better justification for it is that production on notice is not obligatory, and inspection by counsel is not a matter of evidence at all, but a mere preliminary.

A party obtaining an instrument from his adversary by notice to produce, and examining it, cannot examine a witness on it if he will not offer it in evidence.¹

¹*Hotchkiss v. Germania F. Ins. Co.* 5 Hun, 91.

40. Entire conversation or writing.

The introduction of a part of a conversation¹ or writing² renders admissible as much of the remainder as tends to explain or qualify what has been received; and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of, the portion put in evidence.

¹*Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Gildersleeve v. Lançon*, 73 N. Y. 609.

²*Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 284. Whether, under this rule, proving an interview or communication may let in a subsequent one, if thus connected,—compare (in affirmative) *Nesbit v. Stringer*, 2 Duer, 26; (negative) *Downs v. New York C. R. Co.* 47 N. Y. 83.

41. Examination before trial.

One who has examined his adversary before trial and read the examination at the trial is not entitled to examine him further as a witness on the same subject, unless excuse or reason therefor is given.¹

¹*Wilmont v. Meserole*, 8 Jones & S. 321.

It is within the discretion of the judge to permit further oral examination at the trial.¹

¹*Misland v. Boynton*, 14 Hun, 625, Affirmed in 79 N. Y. 630.

If he has not read the examination at the trial he has a right to call him as a witness.¹

¹*Berdell v. Berdell*, 27 Hun, 24, 63 How. Pr. 339.

One who has examined his adversary before trial may read a part of his examination as evidence, but cannot be required to read the whole.¹

¹*Brooks v. Baker* (Per Van Hoesen, J.) 9 Daly, 398, 402, following *Gellatly v. Lowery*, 6 Bosw. 113.

When one has read at the trial part of his adversary's previous examination, his adversary is not entitled to put the whole examination in evidence, but only the answers which pertain to the same subject, or, rather, which tend to qualify what has been read.¹

¹*Lynde v. McGregor*, 13 Allen, 172.

42. Explaining omission of evidence.

When a party's good faith in refraining from testifying in his own behalf,¹ or calling as a witness a person shown to be acquainted with the facts, is questioned, he has a right to give evidence explaining his course.

¹*Woodruff v. Hurson*, 32 Barb. 557.

So, in reference to a Chinese certificate. Greene, Ch. J., said: "Nonproduction of a certificate is a circumstance which, if alone and unexplained, may properly be regarded as proof that the person lacking it is one who is prohibited. But its nonproduction is open to explanation, and the presumption arising from its nonproduction, to contradiction." *Re Lee Yip*, cited and followed in *Re Ho King*, 14 Fed. Rep. 724.

43. Fact after suit brought—receipt.

Under the general issue or any plea which puts the amounts of recovery in dispute, a receipt given after the suit was brought may be given in evidence to reduce the amount of recovery.¹

¹*Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764.

44. — precautions after accident.

Precautions after an accident to prevent other accidents cannot be proved for the purpose of showing that they were needed at the time of the accident, as an admission of negligence.¹

¹*Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554, 28 N. E. 10, and cases cited. See also cases in note, 12 L. R. A. 559.

45. Family Bible.

See *Pedigree, infra*, § 78.

46. Feelings.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are original and competent evidence.¹

¹*Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437; *Matteson v. New York C. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67; *Abbott, Tr. Ev.* 599.

Thus, exclamations and expressions of present pain may be proved by anyone who hears them, even though made subsequently to the injury. *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408. See also cases in note, 13 L. R. A. 465.

47. Fraud.

Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties at or near the same time is admissible.¹

¹*Lincoln v. Clafin*, 7 Wall. 132, 139, 19 L. ed. 106, 109; *Olmsted v. Hotailing*, 1 Hill, 317.

48. Handwriting.

A person who has seen another write his name but once can testify to his handwriting, and he is equally competent if he has personally communicated with him by letter, although he has never seen him write at all.¹

¹*Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417. See *Abbott, Tr. Ev.* 393. See also, generally, as to the admissibility of opinion evidence as to handwriting, note to *Dresler v. Hard* (N. Y.) 12 L. R. A. 456.

49. Illegality.

Not available as a defense unless pleaded.¹

¹13 Abb. N. C. 388, note.

50. Impeaching—one's own witness.

A party cannot impeach his own witness, in the sense of proving him unworthy of credit;¹ but he may show that he was mistaken, and

for this purpose may call other witnesses² or examine him as to previous statements for the purpose of reconciling or correcting his statements, even though the effect may be unfavorable to his credibility.³

¹Neither by general evidence nor by proving by other witnesses prior contradictory statements. *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583, and cases cited.

²*Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 172, with note.

³*Bullard v. Pearsall*, 53 N. Y. 230; 14 Abb. N. C. 471, note.

51. — party testifying for self.

The rule, that before inconsistent statements can be proved against a witness his attention must have been called to them, with time and place, on cross-examination, does not apply where the witness is a party testifying on his own behalf.¹

¹*Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Lucas v. Flinn*, 35 Iowa, 9.

52. — former testimony.

Former testimony of a witness, read under a stipulation allowing it, cannot be impeached by proving inconsistent statements to which his attention has not been called.¹

¹*Hubbard v. Briggs*, 31 N. Y. 518, 536.

The stenographer's minutes on a former trial cannot be used to impeach the testimony of a witness not a party, without first calling his attention to the matter.¹

¹*Seligman v. Ten Eyck*, 53 Mich. 285, 18 N. W. 818.

53. — statements of adverse opinion.

Statements of opinion adverse to the testimony are not competent,¹ unless opinion only in form, but such in substance as to imply contradiction of fact.²

¹*Holmes v. Anderson*, 18 Barb. 420.

²*Schell v. Plumb*, 55 N. Y. 592, Affirming 16 Abb. Pr. N. S. 19.

54. — after full cross-examination.

If a party is allowed to extend his cross-examination of an adversary's witness beyond the limits of a strict cross-examination, he cannot impeach him generally, nor in respect thereto.¹

¹*People v. Moore*, 15 Wend. 422.

55. — when to read inconsistent writing.

The time to read an inconsistent writing in evidence is not on the cross-examination, when the witness's attention is called to it, but when the cross-examining party comes to offer his own evidence.¹

¹*Romertze v. East River Nat. Bank*, 49 N. Y. 577, Reversing 2 Sweeny, 82.

56. Impression.

Witness may testify to an impression if it be memory, not if it be mere belief or inference.¹

¹3 Abb. N. C. 235, note.

57. Intent.

A party may testify in his own behalf to his own intent in doing an act¹ or in the use of ambiguous language,² where the intent is a question of fact in issue,³ and not a conclusion of law necessarily inferred from the fact.⁴

¹*Fisk v. Chester*, 8 Gray, 506 (intent as to residence or domicile); *Hulett v. Hulett*, 37 Vt. 581, 586 (the same); *Danforth v. Carter*, 4 Iowa, 230 (intent to give credit to defendant); *Sweet v. Tuttle*, 14 N. Y. 465; *Abbott, Tr. Ev.* 265 (intent of payment); *Yerkes v. Salomon*, 11 Hun, 471 (wager contract); *Cortland County Superintendent of Poor v. Herkimer County Superintendent of Poor*, 44 N. Y. 22 (good faith of an official act); *People v. Baker*, 96 N. Y. 340 (false pretenses).

As to the admissibility of oral evidence to show the intent of an indorser of a negotiable instrument, see note to *Fullerton v. Hill* (Kan.) 18 L. R. A. 33.

²*Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 Am. Rep. 494 (meaning of an affidavit); 1 Greenl. Ev. § 462, note 1.

Not, however, where the witness was the mere draftsman, and the object is to interpret the right or obligation arising on the instrument. *Nevius v. Dunlap*, 33 N. Y. 676.

³So held of the absence of intent to defraud in making an assignment. *Seymour v. Wilson*, 14 N. Y. 567 (the leading case; judgment reversed for excluding the question); *Starin v. Kelly*, 88 N. Y. 418, and cases cited; *McKown v. Hunter*, 30 N. Y. 625 (good faith in prosecution).

⁴*Fiedler v. Darrin*, 50 N. Y. 437 (usury); *Lawyer v. Loomis*, 3 Thomp. & C. 393 (malice in prosecution without cause).

A party cannot testify in his own behalf to his undisclosed intent, in order to alter the effect of that which was matter of contract,¹ representation,² or estoppel on which the other party had a right to rely.

¹*Dillon v. Anderson*, 43 N. Y. 231; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

²*Ballard v. Lockwood*, 1 Daly, 158; *Waugh v. Fielding*, 48 N. Y. 681 (deceit).

Where it is necessary to prove concurrence of intent,—as in an illegal agreement,—the intent of each person may be proved by independent evidence; and evidence which shows the intent of one person is not incompetent, merely because it is no evidence of the intent of the other, provided appropriate evidence of the intent of the other be given in due course.¹

¹Abbott, Tr. Ev. 739, note 5; *Yerkes v. Salomon*, 11 Hun, 471.

58. Intent of a transaction.

The purpose or policy of an act may be stated by a witness who was present and cognizant of the whole transaction,—as whether the delivery of money by one man to another was by way of payment or otherwise.¹

¹*National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 29, 21 L. ed. 554, 557.

59. Interrogating to discover other witnesses.

Counsel has not an absolute right to interrogate his own witness merely for the sake of ascertaining the name of the person whom he may wish to call as a witness, when the name is not relevant to the issue, but is merely sought by way of discovery to enable him to make inquiry out of court or to subpoena a person as a witness. But in strict cross-examination, where great latitude is allowed without being limited to matters relevant to the issue, questions which may have this object are not improper if not improper on other grounds.¹

¹14 Abb. N. C. 470, note.

60. Judges and justices of the peace as witnesses.

As to their competency as witnesses to testify in a cause on trial before them, see—

Note to *Rogers v. State* (Ark.) 31 L. R. A. 465.

61. Judicial notice.

No proof is necessary in support of a motion where the facts are within the knowledge of the judge in proceedings before him.¹

¹*Secrist v. Petty*, 109 Ill. 188.

Courts will take judicial notice of facts stated in the almanac¹ and of the days of the week as shown by the almanac.²

¹*Reed v. Wilson*, 41 N. J. L. 29.

²*Allman v. Owen*, 31 Ala. 167.

See, further, as to what may be judicially noticed in respect of time, note to *Olive v. State* (Ala.) 4 L. R. A. 35.

The court may take judicial notice of the ordinary course and usages of business of corporations.¹

¹*Isaacson v. New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142, Reversing 25 Hun, 350 (carrier's usage as to checking through baggage) *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627 (supervising trains by telegraph); *Eaton, C. & B. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389, Affirming 18 Hun, 44; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434, Affirming 18 Hun, 176 (practice of banks); *Macullar v. McKinley*, 17 Jones & S. 5 (business and functions of mercantile agencies). See also note to *Olive v. State* (Ala.) 4 L. R. A. 36.

62. Jurisdictional facts—inferior court or statutory proceeding.

Recitals of the necessary jurisdictional facts in a judgment of a court of inferior jurisdiction or in a special statutory proceeding are sufficient prima facie evidence of jurisdiction.¹

If jurisdictional facts do not appear in such a record, extrinsic evidence is competent to supply the defect,² but the presumption that public officers have discharged their duty³ does not supply the defect.⁴

¹*Agricultural Ins. Co. v. Barnard*, 14 Abb. N. C. 502, 96 N. Y. 526, Reversing 26 Hun, 302; *Wright v. Nostrand*, 94 N. Y. 31, Reversing 15 Jones & S. 441.

²*Van Deusen v. Sweet*, 51 N. Y. 378.

³See, in support of this presumption, *Mandeville v. Reynolds*, 68 N. Y. 528, Affirming 5 Hun, 338; *Miller v. Brown*, 56 N. Y. 383.

⁴*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Settlemyer v. Sullivan*, 97 U. S. 447, 24 L. ed. 1111.

63. — court of general jurisdiction.

In support of the judgment of a superior court of general jurisdiction, proceeding according to the due course of common law, the jurisdictional facts are presumed, in respect to parties within the territorial limits of the jurisdiction, if the record is silent. But if the record states an insufficient fact it is not aided by presumption.¹

¹*Dayton v. Johnson*, 69 N. Y. 419.

And this presumption applies as against infants as well as others. *Bosworth v. Vandewalker*, 53 N. Y. 507.

64. Law of other jurisdictions.

The rule that foreign law must be averred and proved as matter of fact applies to the laws of sister states, when involved in a cause in a state court;¹ and in the absence of averment or proof the presumption is that in a state or nation where the common law prevails the common-law rules are the same as those of the forum,² but not that the statutes are.³

¹See *People ex rel. Lawrence v. Brady*, 56 N. Y. 182. See also note to *State v. Behrman* (N. C.) 25 L. R. A. 449.

²*Savage v. O'Neil*, 44 N. Y. 298; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, Reversing 16 Hun, 332. And see *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359, 3 Daly, 288, see also 19 Cent. L. J. 242. See also note to *State v. Behrman* (N. C.) 25 L. R. A. 449.

³*Graves v. Cameron*, 9 Daly, 152; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491.

The common law is not presumed to exist in another state except in the absence of statutory provisions on the subject.¹

¹*Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408, Affirming 27 Hun, 68; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

As to mode of proof of foreign law, see *Abbott*, Tr. Ev. 22, 23; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 473 and note.

The United States courts are bound to take judicial notice of the jurisprudence and public laws of the several states,¹ and of those formerly prevailing in acquired states or territories.²

¹*Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246 (notarial acts); *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. ed. 896 (public statutes). See also note to *Olive v. State* (Ala.) 4 L. R. A. 33.

²*United States v. Perot*, 98 U. S. 428, 25 L. ed. 251.

They may take judicial notice even of a private act if the state court can.¹

¹*Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385. See note to *Olive v. State* (Ala.) 4 L. R. A. 33.

65. Letters.

A party may put in evidence a letter containing admissions material to the case without putting in the whole correspondence.¹

¹*Barrymore v. Taylor*, 1 Esp. 326; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238. Contra, *Simmons v. Haas*, 56 Md. 153.

When a document is properly in evidence, the envelope in which it was delivered, and any other paper which accompanied and was delivered in the envelope is competent as part of the *res gestae*, not as proof of statements in it, but to show under what cover its contents reached the party.¹

¹*United States v. Noelke*, 1 Fed. Rep. 426; *Darling v. Miller*, 54 Barb. 149.

Letters of an agent through whom business was transacted may be received as part of the *res gestae*.¹

¹*Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

66. Letter book.

A press copy of a letter is not primary evidence against the writer.¹

¹*Marsh v. Hand*, 35 Md. 123; *King v. Worthington*, 73 Ill. 161; *Watkins v. Paine*, 57 Ga. 50.

67. Loss of earnings or income.

Annual earnings from professional or other personal services may be proved as a basis for damages in an action for personal injury;¹ but not annual income which includes that arising from capital invested in business and the co-operation of a partner.²

¹*Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, Reversing 66 How. Pr. 161; *Wade v. Leroy*, 20 How. 34, 43, 15 L. ed. 813, 815; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. ed. 271. And see *Bierbach v. Goodyear Rubber Co.* 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514.

²*Masterton v. Mt. Vernon*, 58 N. Y. 391.

68. Mailing.

Evidence that a postpaid notice of protest was duly mailed, by deposit either in the postoffice, a government letter box,¹ or the hand of the official letter carrier on his round,² and addressed to another town, is conclusive evidence of its receipt.

¹*Wynen v. Schappert*, 6 Daly, 558.

²*Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737.

So, also, evidence that it was put in due course for mailing is competent.¹

¹*Abbott*, Tr. Ev. 434.

Evidence that a letter other than notice of protest was so duly mailed; or that it was deposited where in due course of business it should have been mailed or received, with evidence of such course of business, is competent to go to the jury, and will sustain a finding of actual receipt, but does not raise a legal presumption thereof.¹

¹*Rosenthal v. Walker*, 111 U. S. 185, 193, 28 L. ed. 395, 398, 4 Sup. Ct. Rep. 382 (holding this presumption sufficient to let in letter-press copies); *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246, with note;

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (deposit in private letter box); *United States v. Babcock*, 3 Dill. 566, 571, Fed. Cas. Nos. 14,484, 14,485; *Sullivan v. Kuykendall*, 82 Ky. 483; *Abbott, Tr. Ev.* 291.

69. Memorandum.

Papers, not evidence *per se*, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of the witness who made them.¹

¹*Insurance Companies v. Weide*, 14 Wall. 375, *sub nom. Republic F. Ins. Co. v. Weide*, 20 L. ed. 894, and cases cited.

A memorandum shown to be correct, taken from lost papers, is evidence of their contents.¹

¹*Etna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

70. Memory of one witness aided by another.

Amount allowed to be proved by testimony of a witness that he once knew it and told it correctly to plaintiff, and testimony of plaintiff to what amount the witness told him.¹

¹*Shear v. Van Dyke*, 10 Hun, 528.

71. Mental capacity.

Whether a witness may give an opinion on the exact issue to be tried in respect of mental capacity or sanity is contested.¹

¹Affirmative:—*Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144 (testator's capacity to make a disposition of his property); *Beller v. Jones*, 22 Ark. 92 (capacity of a party to make a contract or deed).

Negative:—*Brown v. Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621 (capacity to make a will).

See, further, for an exhaustive and classified collection of cases on this question, note to 36 L. R. A. 64.

And for a comprehensive treatment of the admissibility or opinion evidence, both expert and nonexpert, as to sanity or insanity, see notes to *Ryder v. State* (Ga.) 38 L. R. A. 721; *Burt v. State* (Tex. Crim. App.) 39 L. R. A. 305; and *Re Stetson* (Mass.) 39 L. R. A. 715.

72. Minutes.

The minutes of a judge or referee on a former trial cannot be read as evidence of what was there testified, if he be living but testifies that he cannot say they contain the testimony accurately, but may have omitted some things.¹

¹*Huff v. Bennett*, 6 N. Y. 337, *Affirming* 4 Sandf. 120.

73. Motive.

When the motive of a party or witness in performing a particular act or in making a particular declaration becomes material in a cause, he may himself testify in regard to it.¹

¹*Tracy v. McManus*, 58 N. Y. 257; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158. And see *Intent*, *supra*, § 57.

74. Notary's seal.

The court will take judicial notice of the seals of notaries public.¹

¹*Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

75. Official act.

The presumption is that no official person, acting under oath of office, will do aught against his official duty, or will omit to do aught which his official duty requires to be done.¹

¹*Mandeville v. Reynolds*, 68 N. Y. 528, Affirming 5 Hun, 338. See also note to *Douglass v. Bishop* (Kan.) 10 L. R. A. 857.

This presumption does not supply proof of a substantive fact.¹

¹*United States v. Ross*, 92 U. S. 281, 23 L. ed. 707.

76. Opinions.

See notes to *Kerr v. Lunsford* (W. Va.) 2 L. R. A. 668; *Moore v. Kenockee Township* (Mich.) 4 L. R. A. 555, and *Graham v. Pennsylvania Co.* (Pa.) 12 L. R. A. 293.

77. Oral to vary.

For the numerous exceptions to the rule excluding oral evidence offered to vary or explain a writing, see—¹

¹*Abbott*, Tr. Ev. 295; 3 Abb. N. C. 372, note (statutes); *Juilliard v. Chaffee*, 92 N. Y. 529 (negotiable paper); *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *White v. Miner's Nat. Bank*, 102 U. S. 658, 26 L. ed. 250; *Van Brunt v. Day*, 8 Abb. N. C. 336, 81 N. Y. 251, Reversing 17 Hun, 166 (collateral stipulation); *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88 (contract); *West v. Smith*, 101 U. S. 263, 25 L. ed. 809 (correspondence); *Rhodes v. Cleveland Rolling-Mill Co.* 17 Fed. Rep. 426 (meaning of expressions); *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613 (true amount of consideration in deed); *Union R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391 (object of deed "in trust"); *Clafin v. Fletcher*, 7 Fed. Rep. 851 (real property in interest in judgment); *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527 (surrounding circumstances); *Mobile & M. R. Co. v. Jurcy*, 111 U. S. 584,

591, 28 L. ed. 527, 530, 4 Sup. Ct. Rep. 566 (allowing evidence that writing did not express the parol agreement, and was not authoritatively delivered).

See also notes in 6 L. R. A. 33, 164 (consideration of contract); 20 L. R. A. 101 (consideration of deed); 6 L. R. A. 321, and 17 L. R. A. 270 (evidence of intention); 13 L. R. A. 52 (as affecting indorsement); 4 L. R. A. 427, 6 L. R. A. 45, and 17 L. R. A. 273 (fraudulent intent); 1 L. R. A. 594, 816, 3 L. R. A. 936, and 13 L. R. A. 649 (as between parties to promissory note); 20 L. R. A. 705 (to show who liable as maker of note); 19 L. R. A. 302 (warehouse receipts); 6 L. R. A. 323 (to identify beneficiary); 6 L. R. A. 43 (to identify person); 1 L. R. A. 838, 3 L. R. A. 805, and 6 L. R. A. 41, 322 (to explain ambiguity); 25 L. R. A. 265 (real party in interest in a contract).

78. Pedigree.

As to when and under what conditions entries in a family Bible are admissible as evidence in matters of pedigree, see—

Note to *Supreme Council of the G. S. F. v. Conklin* (N. J. L.) 41 L.R.A. 449.

As to declarations or acts of others as evidence of marriage or pedigree, see—

Notes to *White v. White* (Cal.) 7 L. R. A. 799, and *Eisenlord v. Clum* (N. Y.) 12 L. R. A. 838.

79. Reason for positiveness.

A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.¹

¹*Blackwell v. Hamilton*, 47 Ala. 472; *Angell v. Rosenbury*, 12 Mich. 241, 256; *Cole v. Lake Shore & M. S. R. Co.* 105 Mich. 549, 63 N. W. 647; *Dikeman v. Arnold*, 83 Mich. 218, 47 N. W. 113; *Thomas v. State*, 27 Ga. 287.

But he cannot, under pretense of giving reasons for his recollection, state facts material to the issue, but inadmissible by the rules of evidence. *McBride v. Cicotte*, 4 Mich. 478.

Nor can a party bolster up testimony of his own witness by asking for the reasons which induced the conclusions to which he had just testified. *Sprenger v. Tacoma Traction Co.* 15 Wash. 660, 43 L. R. A. 706, 47 Pac. 17.

80. Receipt.

Any terms in a receipt which import a binding contract or stipulation between the parties are within the rule excluding parol evidence to vary a contract,¹ but that which is a mere receipt is not.²

¹*The Lady Franklin*, 8 Wall. 325, *sub nom. King v. The Lady Franklin*, 19 L. ed. 455 and note (words agreeing to account on demand for the thing receipted held not a contract within the rule; so held as between third persons); *Eaton v. Alger*, 2 Abb. App. Dec. 5. Compare *Knoblauch v. Kronschnabel*, 18 Minn. 300, Gil. 272.

¹*The Lady Franklin*, 8 Wall. 325, *sub nom. King v. The Lady Franklin*, 19 L. ed. 455 and note. So held of a bill of lading. *Ibid.*

A mere receipt, if not sufficiently explained or contradicted, is conclusive.¹

¹*Riley v. New York*, 96 N. Y. 331.

81. Reference to a third person.

When a person refers to another for an answer on a particular subject, the answer is, in general, evidence against him.¹

¹*Duval v. Covenhoven*, 4 Wend. 564.

This rule does not let in statements on a different subject, such as information given to one who was sent for money¹ or for instructions,² not for information.

¹*Allen v. Killinger*, 8 Wall. 480, *sub nom. Murphy v. Killinger*, 19 L. ed. 470.

²*Duval v. Covenhoven*, 4 Wend. 564.

It does not let in the results of inquiries made by the third person in consequence of the reference, such as what was entered in the books in his charge.¹

¹*Lambert v. People*, 6 Abb. N. C. 181, 76 N. Y. 220, 32 Am. Rep. 293.

82. Relevancy.

Whatever testimony will assist in showing which party speaks the truth as to any of the issues is relevant.¹

¹*Platner v. Platner*, 78 N. Y. 90.

83. Remote evidence.

Evidence may be rejected as too remote.¹

¹*Xenia Bank v. Stewart*, 114 U. S. 224, 231, 29 L. ed. 101, 103, 5 Sup. Ct. Rep. 845, and cases cited; *Nicholson v. Waful*, 70 N. Y. 604, Reversing 6 Hun, 655.

84. Res gestae.

The rule of the *res gestae* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.¹

¹*Com. v. Hackett*, 2 Allen, 136; *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397,

19 L. ed. 437 (a leading case, but carrying the rule to the extreme of its usual limits, and not followed to that extent in all the states).

Conversation preceding the act may be admitted.¹

¹*Ahern v. Goodspeed*, 72 N. Y. 108, Affirming 9 Hun, 263; *Schnicker v. People*, 88 N. Y. 192.

So may acts and declarations of third persons strangers to the action, as, for instance, fellow passengers in a railroad collision.¹

¹*Twomley v. Central Park, N. & E. River R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Norwich Transp. Co. v. Flint*, 13 Wall. 3, 20 L. ed. 556.

The rule of the *res gestae* does not admit declarations so separated from the occasion as not to gain credit from the impulse of the exigency, or as to admit the influence of intervening motives.¹

¹*Abbott*, Tr. Ev. 588, and cases cited. 14 Am. L. Rev. 817, 15 Am. L. Rev. 71; *Waldele v. New York C. & H. R. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41, 52 (declaration half an hour after the occurrence); *McDermott v. Hannibal & St. J. R. Co.* 73 Mo. 516, 39 Am. Rep. 526.

It does not admit a narrative of a past fact.¹

¹*First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

And for further cases as to how near the main transaction declarations must be made in order to constitute part of the *res gestæ*, see notes to *Ohio & M. R. Co. v. Stein* (Ind.) 19 L. R. A. 733, and *Barker v. St. Louis, I. M. & S. R. Co.* (Mo.) 26 L. R. A. 843.

85. Statute of frauds.

Where several papers are relied on they must be connected physically or by reference.¹

¹*Tallman v. Franklin*, 14 N. Y. 584, 588, Reversing 3 Duer, 395; *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366. Exceptions to this rule: *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 496.

Whether the law of the forum or of the place of contract applies depends on whether the question is one of title to realty or, if not, on whether the statute is so expressed as to go to the validity of the contract, or as only forbidding an action.¹

¹*Marie v. Garrison*, 13 Abb. N. C. 214, 299.

86. Stenographer's minutes.

Testimony given on a former trial of the same cause by a witness

now deceased or beyond the jurisdiction¹ may be proved by the stenographer's minutes.²

¹For cases on the general rule, see 3 Abbott, N. Y. Dig. new ed. 109.

²*Stewart v. First Nat. Bank*, 43 Mich. 257, 5 N. W. 302 (no question as to mode of authentication seems to have been made). So of a deceased witness.

The minutes, though certified by the stenographer, are not competent without further authentication.¹ Otherwise, where the statute makes them evidence.²

¹*Phares v. Barber*, 61 Ill. 271 (minor point and facts not stated); s. p. *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98.

²*State v. Frederic*, 69 Me. 400. They may be admissible after his death as entries in the course of duty.

Where the stenographer who transcribed the minutes testified that his transcript was absolutely correct, but that he had not compared it,—Held, not error to exclude for want of comparison. *People v. McKinney*, 49 Mich. 334 (Cooley, J., criminal case).

87. Stipulation as to facts.

A stipulation admitting the facts for the purposes of the trial does not exclude further evidence, unless so expressed.¹

¹*Dillon v. Cockcroft*, 90 N. Y. 649.

88. — relief against.

An application to relieve against a stipulation, on the ground that the allegations admitted by it were false, must be by special motion. It is not error to refuse to consider the motion at the trial.¹

¹*Frisbee v. Fitzsimons*, 3 Hun, 674.

The party should ask leave to withdraw a juror.¹

¹*Dillon v. Cockcroft*, 90 N. Y. 649.

89. Subscribing witness to prove execution.

The general rule is, that the attesting witness to a written instrument is regarded as the person properly to be called to prove its execution, when he can be had,¹ though there are, of course, exceptions to this rule.²

¹*Barry v. Ryan*, 4 Gray, 523 (lease); *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272 (assignment of an instrument); *Jenks v. Terrell*, 73 Ala. 238 (receipt). Contra, *Garrett v. Hanshue*, 53 Ohio St. 482, 35 L. R. A. 321, 42 N. E. 256.

¹For a comprehensive treatment of the rule and its exceptions, see note to *Garrett v. Hanshue* (Ohio) 35 L. R. A. 321 *et seq.*

90. Tampering.

It is competent to prove that the adverse party has tampered with witnesses¹ or a juror.²

¹*Gulerette v. McKinley*, 27 Hun, 320 (offer to bribe); *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Egan v. Bowker*, 5 Allen, 449 (subornation of a deposition competent though deposition be not used); *Brown v. Byam*, 65 Iowa, 374, 21 N. W. 684; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14 (letters urging testimony in specified way, or warning against aiding adversary); *People v. Marion*, 29 Mich. 31. Unnecessary to cross-examine the witness first. *Martin v. Barnes*, 7 Wis. 239.

²*People v. Marion*, 29 Mich. 31.

That plaintiff's agent tampered with evidence, not enough, unless shown to have been done in the course of employment.¹

¹*Green v. Woodbury*, 48 Vt. 5; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29.

A party charged with tampering has a right to testify in explanation.¹

¹*Homer v. Everett*, 91 N. Y. 641; *Donohue v. People*, 56 N. Y. 208; *Lynch v. Coffin*, 131 Mass. 311 (saying the judge may, in his discretion, allow explanation).

91. Telegrams.

In general, where the course of communication is such that the message as delivered to the telegraph company binds either party, that paper is primary evidence as against such party. Where such that the message as received binds either party, that paper is primary evidence against him.¹

¹*Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 388 and 394, with note, and cases there collected on all the various aspects of offering telegrams as evidence.

Relevant letters and telegrams which the party, on testifying as a witness, does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.¹

¹*Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 388 and 394, with note and cases there collected on all the various aspects of offering telegrams as evidence.

92. Telephone.

One who knowingly communicates by telephone, through the operator at the other end interpreting what he says to his interlocutor, makes the operator his agent; and the statements so made by the operator are competent against the sender, and may be proved by any person who heard the operator's interpretation.¹

¹*Sullivan v. Kuykendall*, 82 Ky. 483, 24 Am. L. Reg. N. S. 442, Disapproved in note in 24 Am. L. Reg. N. S. 452. See also *Oskamp v. Gadsden*, 35 Neb. 7, 17 L. R. A. 440.

Compare *Shear v. Van Dyke*, 10 Hun, 528, cited *supra*, § 70, *Memory of one witness aided by another*.

Whether the utterance of voice as heard through the telephone is alone sufficient evidence of identity, see 28 Alb. L. J. 422.

See further, as to admissibility of telephone conversations, note to *Oskamp v. Gadsden* (Neb.) 17 L. R. A. 440.

93. Trust.

Oral evidence is competent to establish a trust, notwithstanding the Statute of Frauds, where its exclusion would work a fraud.¹

¹13 Abb. N. C. 334, 338, note; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640.

As to tracing records, see *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; 9 Abb. N. C. 41, note.

As to oral evidence of trust in partnership land, see note to *Robinson Bank v. Miller* (Ill.) 27 L. R. A. 464; to vary trust, note to *Collar v. Collar* (Mich.) 13 L. R. A. 622; to establish trust, notes to *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 47, and *Durkin v. Cobleigh* (Mass.) 17 L. R. A. 270.

94. United States courts.

"*The mode of proof*, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."¹

¹United States Rev. Stat. § 861.

The provisions referred to as "hereinafter" relate to taking depositions, and do not sanction examinations before trial, such as allowed by recent state statutes.¹

¹*Ex parte Fisk*, 113 U. S. 713, 726, 28 L. ed. 1117, 1122, 5 Sup. Ct. Rep. 724.

Every action at law in a court of the United States must be governed by the rule or by the exceptions which U. S. Rev. Stat. § 861, *supra*, provides. There is no place for exceptions made by state statutes.¹

¹*Ex parte Fisk*, *supra*.

"In the courts of the United States, no witnesses shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against exécutors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."¹

¹United States Rev. Stat. § 858.

This provision (U. S. Rev. Stat. § 858) wherever it differs from the state statutes controls the United States courts.¹

¹*King v. Worthington*, 104 U. S. 44, 51, 26 L. ed. 652, 655.

In other respects than as above provided, the law of evidence prevailing in the state courts controls the courts of the United States.¹

¹United States Rev. Stat. § 858, last clause; *Vance v. Campbell*, 1 Black, 427, and note in 17 L. ed. 168; *King v. Worthington*, 104 U. S. 44, 50, 26 L. ed. 652, 654; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 255, 28 L. ed. 708, 710, 5 Sup. Ct. Rep. 119.

See, also, on this question, note to *Re Secretary of the Treasury* (C. C. S. D. N. Y.) 11 L. R. A. 275.

95. Usage.

In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law and not unreasonable.¹

¹*Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Fuller v. Robinson*, 86 N. Y. 306, 40 Am. Rep. 540.

For the general rule and its exceptions, see¹—

¹1 Abb. N. C. 470, note, and Abbott, Tr. Ev. 296.

As to the admissibility of oral evidence of a custom or usage, see note to *Conestoga Cigar Co. v. Finke* (Pa.) 13 L. R. A. 440.

That evidence of usage or custom is not admissible on a question of negligence, see note to *MacCulsky v. Klosterman* (Or.) 10 L. R. A. 786.

Usage cannot be proved to contradict a rule of law;¹ or contradict unambiguous terms in the contract;² or its legal effect.³

¹*Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, and cases cited; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987. See also note to *Conestoga Cigar Co. v. Finke* (Pa.) 13 L. R. A. 438.

²*Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568. See also note to *Conestoga Cigar Co. v. Finke* (Pa.) 13 L. R. A. 440.

³*Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987.

Usage of language may be proved to show the meaning of words otherwise unambiguous.¹

¹*Myers v. Sarl*, 30 L. J. Q. B. N. S. 9, 7 Jur. N. S. 97.

If a usage of a particular trade or locality is proved, the adverse party, if not of such trade, may rebut its effect by proving his ignorance of it.¹

¹*Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Johnson v. DePeyster*, 50 N. Y. 666.

The good faith of a transaction being impugned, conformity to usage may be shown.¹

¹*Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226.

96. Value and damage.

Where the witness is competent and states the facts, his conclusion as to the amount of pecuniary injury to property having a market value—i. e., the value before and after the injury—is generally deemed admissible, although it may be identical with the question on which the jury are to find.¹

¹*Abbott, Tr. Ev.* 598; 3 *Abbott, N. Y. Dig.* 79; 7 *Abbott, N. Y. Dig.* 755-757.

As to opinion evidence on a question of the value of land, taken in a condemnation proceeding, see note to *San Diego Land & Town Co. v. Neale* (Cal.) 3 L. R. A. 83.

As to opinion evidence on the question of the value of legal services, see *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, and note to same case, 11 L. R. A. 787.

ABB.—23.

XVI.—ABSENCE OF JUDGE AND PROCEEDINGS OUTSIDE OF THE COURTROOM.

1. Absence during argument.
2. — reception of verdict.

3. Proceedings outside of the court room.

1. Absence during argument.

The argument of a cause is as much a part of the trial as the hearing of evidence, and the judge cannot properly absent himself from the courtroom during the course of counsel's discussion.¹

¹*Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682. To the same effect are *Palin v. State*, 38 Neb. 867, 57 Neb. 743; *Meredeth v. People*, 84 Ill. 479 (criminal cases). In the latter case the court says: "The absence of the judge from the courtroom, engaged in other judicial labors for a part of two days, in a trial of this magnitude, cannot be justified on any principle or for any cause. It is not allowable in a trial involving only mere property interests, much less in a case where the life of a human being depends upon the issue."

But the absence of the judge during argument of the cause, although improper, is not ground for reversal if it satisfactorily appears that no prejudice resulted. *Allen v. Ames College R. Co.* 106 Iowa, 602, 76 N. W. 848. See also *Turbeville v. State*, 56 Miss. 793 (a criminal case), in which it was held that to constitute reversible error there must be a relinquishment by the judge of the functions of his office, or such bodily absence as prevents their instant assertion when demanded. So, in a recent criminal case in Illinois, the absence of the judge from the courtroom during argument, although improper, was held not to be ground for reversal where he could still hear the argument and was in a position to pass upon any question which might properly arise. *Schintz v. People*, 178 Ill. 320, 52 N. E. 903.

It seems to be a practice with some courts in Missouri to send the jury out of the courtroom with counsel for the purpose of hearing the argument while the court proceeds to the trial of another cause. But this practice has been severely criticised. *Brownlee v. Hewitt*, 1 Mo. App. 360; *State ex rel. Gehring v. Claudius*, 1 Mo. App. 557. In the latter case the court says: "We will not say that in no case must a

court send the parties and the jury to another room to argue a cause after the evidence is closed, or that in no case must the judge absent himself from the courtroom while the argument is in progress, but we have no hesitation in saying that the practice is full of risk; that it imposes upon counsel on both sides the obligation of the most scrupulous observance of professional propriety; and that any disregard of this obligation will incur extreme hazard of a reversal if the party charged with it has profited by such disregard." The two cases last cited are also authority for the proposition that neither party is bound by his consent to such a proceeding, since counsel are in such a position that they cannot well refuse to adopt the court's suggestion. A similar custom seems to be upheld in Iowa as a consequence of the prohibition against any limitation by a *nisi prius* judge upon the time to be used by counsel in their arguments to the jury. *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710.

For a further discussion of the effect of the temporary absence of the judge, see note to *Ellersbee v. State* (Miss.) 41 L. R. A. 569.

2. — reception of verdict.

The reception of a verdict is a judicial act which cannot be delegated to be exercised by agent or deputy.¹

¹An attorney cannot be authorized by the court to receive a verdict even with the consent of the parties. *Britton v. Fox*, 39 Ind. 369; *McClure v. State*, 77 Ind. 287. Nor can the parties by consenting to the court's suggestion authorize the clerk to receive a verdict and discharge the jury in the absence of the judge. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447; *Willett v. Porter*, 42 Ind. 250. Contra, *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821. See also *Davis v. Wilson*, 65 Ill. 525, in which the putting of a verdict in form and the discharging of the jury are held to be judicial functions which cannot be delegated to an attorney without the consent of the parties appearing of record. Whether such consent would authorize the proceeding the court expressly refrained from deciding.

3. Proceedings outside of the courtroom.

As has been already noted, the jury are sometimes permitted to take a view of premises outside the courtroom.¹ To permit other proceedings to be had outside the courtroom is irregular, but is generally no ground for reversal where no prejudice has resulted.²

¹See *ante*, Division XIV. *Exhibition and View*.

²Taking the testimony of the plaintiff at her own house to which the presiding judge and the jurors go for that purpose against defendant's objection, although it cannot be regarded as done in open court, does not deprive the court of jurisdiction or nullify the judgment, but is at most an irregularity. *Selleck v. Jancsville*, 100 Wis. 157, 41 L. R. A. 563, 75 N. W. 975. But see *Funk v. Carroll County*, 96 Iowa, 158, 64 N. W. 768, in which it was held that the court has no authority, unless by consent of the parties, to adjourn to a private house for the purpose

of taking the testimony of a sick witness who is unable to attend the courthouse, and that the court so sitting is without jurisdiction. It is to be observed that this case was decided under a statute providing that courts must be held at the place provided by law, except for the determination of certain specified matters, when they may, by consent of parties, be held at some other place.

The fact that a trial is begun in one room and finished in another across the hall from the first is not ground for setting aside the verdict. *Christie v. Bowne*, 76 Hun, 42, 27 N. Y. Supp. 657. So the adjournment of the county court by the presiding judge to the house of an assistant judge who was ill and unable to leave his residence, situated in the same village as the courthouse, and the rendition of judgment at that place, are within the powers of the court, under statutes providing that the county court for that county shall be held in that village, and that, where the state of business requires, it may adjourn within the county to any day previous to the next stated term. *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013. And the proceedings of the court in which the judge, after calling the case, directed the jury, officers, parties, and witnesses to repair to a neighboring law office while arguments in the preceding trial were being made, where the judge called and swore the jury and witnesses, heard the testimony and received the verdict, discharged the jury and delivered the proceedings to the clerk, after which he returned to the bench and conducted the business of the court as usual, though irregular, do not render the judgment void or authorize its reversal, where the complaining party took part in all proceedings, and there was nothing to show that he did not have a fair trial or that a different judgment should have been rendered. *Mohon v. Harkreader*, 18 Kan. 383. And see *post*, Division XXIII. § 2. For a further discussion of this question see note to *Selleck v. Janesville* (Wis.) 41 L. R. A. 563.

XVII.—IMPROPER CONDUCT OF JUDGE.

1. Comments on witnesses or their testimony.
2. Complaint of consumption of time.
3. Remarks to counsel.
4. Exceptions to incidental remarks.

1. Comments on witnesses or their testimony.

Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend to either magnify or diminish it in the jury's estimation.¹

¹*McMinn v. Whelan*, 27 Cal. 300; *Ruppert v. Wolf*, 4 App. D. C. 556; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Kane v. Kinnare*, 69 Ill. App. 81; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 47 N. W. 671; *Schmidt v. St. Louis R. Co.* 149 Mo. 269, 50 S. W. 921.

A remark of the court to counsel who is seeking to shield a witness from more fully answering a question that the witness has not yet answered the question "fairly," is not such a reflection upon the credibility of the witness as will justify a reversal of the judgment. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796. And a reprehensible remark by the court concerning the testimony of a witness will not require a reversal where it cannot be deemed to have affected the result. *Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71.

The discretion of the trial court in addressing remarks to a witness who, in the court's opinion, is purposely trying to avoid disclosing facts within his knowledge, will not be disturbed except for a clear abuse. *State v. Eldred*, 8 Kan. App. —, 56 Pac. 153. The court does not necessarily abuse its discretion by interrupting a witness to ask him "How do you know?" "Tell what you know," "Don't tell what you suppose," etc. (*Ferguson v. Hirsch*, 54 Ind. 337). Nor by stating to a witness that his answer "I don't remember" will not do. *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693. So the court may, where a witness is consuming time by evasive answers to a question on cross-examination as to whether a matter to which he has testified on his direct examina-

tion is true, state to the witness that he must know whether or not such is the fact. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

2. Complaint of consumption of time.

A natural impatience manifested by the trial judge at the length of time consumed by counsel in examination or argument is not ground for reversal,¹ though an unjust characterization of a cause as trivial and unworthy the time spent upon it may furnish ground for exception.²

¹*Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653; *McMahon v. Eau Claire Waterworks Co.* 95 Wis. 640, 70 N. W. 829; *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921.

But for the court to accompany an abrupt dismissal of a witness from the stand with the remark, "I am not going to stay here any longer and have a witness asked questions for the mere purpose of taking up time," is reversible error, where the court has taken nearly as much time as counsel in the examination of the witness and at the time counsel was endeavoring to elicit material testimony. *Darrow v. Pierce*, 91 Mich. 63, 51 N. W. 813.

²It is error for the court to characterize a suit brought for redress for the maltreatment of a mother and her infant child without legal right or excuse as "trivial" and unworthy of the time spent upon it, where no unusual amount of time was consumed on trial and no desire to procrastinate was apparent on either side. *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

3. Remarks to counsel.

Misconduct of counsel is a proper subject for comment by the trial judge,¹ but an unwarranted intimation that counsel is pursuing an unfair course in his conduct of the trial will justify a reversal.² And it is improper for the court to address remarks to counsel to whom clients have intrusted their interests which reflect upon his want of capacity or comprehension and tend to disparage him in the eyes of the jury.³

¹*Whitney v. Swensen*, 43 Minn. 337, 45 N. W. 609; *Krapp v. Hauer*, 38 Kan. 430, 16 Pac. 702; *Tuller v. Ginsburg*, 99 Mich. 137, 57 N. W. 1099.

²*McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592.

But the remark of the judge when requested to charge the jury in writing that such requests were never made except when counsel were angry with court and that there was no excuse therefor when there was a stenographer to report the case, though improper, will not require a reversal where no prejudice affirmatively appears. *McLeod v. Wilson*, 108 Ga. 790, 33 S. E. 851.

³*Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328; *Wheeler v. Wallace*, 53 Mich. 355; *Walker v. Coleman*, 55 Kan. 381, 40 Pac. 640.

But caustic remarks addressed to counsel in criticism of his mode of cross-examining witnesses are not ground for complaint unless prejudice affirmatively appears. *McMahon v. Eau Claire Waterworks Co.* 95 Wis. 640, 70 N. W. 829.

4. Exceptions to incidental remarks.

An exception lies to remarks of the judge which are in the nature of instructions to the jury or calculated to be so understood by them.¹

¹*Daly v. Byrne*, 77 N. Y. 182, Affirming 11 Jones & S. 261; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282.

The rule in New York seems to have been that improper remarks by the judge in the presence of the jury could only be reviewed by a motion to set aside the verdict unless they announced an erroneous rule of law. *Ibid.*; *Conners v. Walsh*, 131 N. Y. 590, 30 N. E. 59. But in the recent case of *Klinker v. Third Ave. R. Co.* 26 App. Div. 322, 49 N. Y. Supp. 793, it is said that improper remarks and comments by the trial judge during the trial may be reviewed upon an exception under a Code amendment which provides that the stenographer at a jury trial shall fully note each and every ruling, remark, or comment of the judge during the trial when requested to do so by either party "together with each and every exception taken to any such ruling, decision, remark, or comment."

XVIII.—STOPPING THE CASE.

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|---|-------------------------|
| 1. Voluntary nonsuit — common-law rule. | 7. — exceptional cases. |
| 2-6. — statutory restrictions. | 8. Withdrawal of juror. |

1. Voluntary nonsuit—common-law rule.

At common law plaintiff has a right voluntarily to submit to nonsuit at any time before the jury have rendered their verdict.¹

¹*Wooster v. Burr*, 2 Wend. 295; *Graham*, Pr. 2d ed. 310; *Smith*, Action, 137; s. p. *Bell v. Gardner*, 77 Ill. 319; *Piedmont Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264; *Lawrin v. Hanks*, 3 McCord, L. 559.

Even after charge, and verdict made up, but not announced. *Peoples v. Root*, 48 Ga. 592; *Graham v. Tate*, 77 N. C. 120; *Tate v. Phillips*, 77 N. C. 126. Not allowed after verdict published (*Brown v. King*, 107 N. C. 313, 12 S. E. 137), or delivered to one allowed by the court to receive it. *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

Allowed even after motion for compulsory nonsuit made on sufficient ground. *Pescud v. Hawkins*, 71 N. C. 299; s. p. *Schafer v. Weaver*, 20 Kan. 294. Or to direct a verdict for defendant. *Jackson v. Merritt*, 21 D. C. 276.

Whether the jury leave their bench or not, plaintiff, by not answering when called, may preclude them from giving a verdict. *Cunningham v. Duncan*, Anthon, N. P. 61.

His silence is not assent to the reading of a verdict. *People ex rel. Stafford v. Mayor's Court*, 1 Wend. 36.

2-6.—statutory restrictions.

In New York,¹ Missouri,² Kansas,³ Iowa,⁴ Texas,⁵ New Jersey,⁶ Arkansas,⁷ Kentucky,⁸ Nebraska,⁹ and Washington¹⁰ this cannot be done after the case has been submitted to the jury to consider of their verdict.

¹New York Code Civ. Proc. § 1182.

²*Fink v. Bruhl*, 47 Mo. 173; *Savoni v. Brashear*, 46 Mo. 345.

Nor after direction of entry of judgment, if opportunity was given plaintiff before such direction, and he then failed to take the nonsuit. *Pabst Brewing Co. v. Smith*, 59 Mo. App. 476.

**Schafer v. Weaver*, 20 Kan. 294; *New Hampshire Bkg. Co. v. Ball*, 57 Kan. 812, 48 Pac. 137.

And the Federal court sitting in Kansas will follow the state practice in this respect. *Ætna L. Ins. Co. v. Hamilton County Comrs.* 49 U. S. App. 122, 79 Fed. Rep. 575, 25 C. C. A. 94.

**Harris v. Beam*, 46 Iowa, 118 (holding that it may be done after the judge has directed a verdict, for the jury have not been then directed to retire nor to enter upon the consideration of the case without retiring); *Oppenheimer v. Elmore* (Iowa) 80 N. W. 307 (holding that it may be done after defendant has moved to direct a verdict in his favor on plaintiff's evidence, and the court has indicated its intention to sustain the motion).

**Frois v. Mayfield*, 31 Tex. 366; *Peck v. McKellar*, 33 Tex. 234.

But plaintiff may take a nonsuit where the court erroneously withdraws the case from the jury and directs a verdict for defendant. *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564.

And in *Oakland Home Ins. Co. v. Davis* (Tex. Civ. App.) 33 S. W. 587, plaintiff was allowed to take a nonsuit after the court had announced that it had become convinced that the overruling of a demurrer to plaintiff's evidence was erroneous, and the demurrer well taken, and that it would set aside the judgment that had been entered in plaintiff's favor, as such an announcement was not an announcement of a judgment upon the demurrer, although the ruling if maintained would lead to such a judgment.

**Bauman v. Whiteley*, 57 N. J. L. 487, 31 Atl. 982.

*Sand. & H. Dig. §§ 5102, 5103.

This statute is also in force in the Indian territory. *Davison v. Gibson*, 40 U. S. App. 463, 76 Fed. Rep. 717, 22 C. C. A. 511.

**Northwestern Mut. L. Ins. Co. v. Barbour*, 95 Ky. 7, 23 S. W. 584.

But it may, after the granting of a requested instruction to find for defendant, but before it is actually given. *Vertrees v. Newport News & M. Valley R. Co.* 95 Ky. 314, 25 S. W. 1.

**Beals v. Western U. Teleg. Co.* 53 Neb. 601, 74 N. W. 54.

*It can be done at any time prior to a decision sustaining a motion by defendant to discharge the jury, and for judgment under Ball. Code, § 4994, but not after. *Dunkle v. Spokane Falls & N. R. Co.* 20 Wash. 254, 55 Pac. 51.

In Wisconsin, the plaintiff cannot submit to a voluntary nonsuit after the arguments to the jury have been concluded or waived.¹

¹Sanb. & B. Wis. Stat. § 2856.

In Massachusetts, Maine, New Hampshire, and the United States circuit courts, submitting to a voluntary nonsuit after the trial has

begun rests in the discretion of the court; allowing it as matter of right, without the exercise of discretion is error.¹

¹*Truro v. Atkins*, 122 Mass. 418; *Washburn v. Allen*, 77 Me. 344; *Fulford v. Converse*, 54 N. H. 543, and cases cited; *Johnson v. Bailey*, 59 Fed. Rep. 670.

Before the cause is open to the jury it is matter of right. *Burbank v. Woodward*, 124 Mass. 357; *Farr v. Cate*, 58 N. H. 367.

But it should not be permitted after he has put in all his evidence, and is not surprised by any evidence put in by defendant. *Johnson v. Bailey*, 59 Fed. Rep. 670.

In Pennsylvania the statute terminates plaintiff's right to submit to a nonsuit at the point when the jury, in response to the usual inquiry, have finally announced to the court their readiness to give in their verdict.¹

¹*Mc'Lughan v. Bovard*, 4 Watts, 308, 316; *Easton Bank v. Coryell*, 9 Watts & S. 153; *Kates v. Lewis*, 2 Clark (Pa.) 53.

In Indiana,¹ Virginia,² Alabama,³ and Florida,⁴ it cannot be done after the jury have retired.

¹*Dunning v. Galloway*, 47 Ind. 182; *Helm v. First Nat. Bank*, 91 Ind. 44; 1 Horner Ind. Stat. § 333 (Code Civ. Proc.)

²Minor, Inst. part 1, p. 782, etc.

³*Blackburn v. Minter*, 22 Ala. 613.

⁴*National Broadway Bank v. Lesley*, 31 Fla. 56, 12 So. 525 (error to refuse an application made before the jury have retired).

In California it may be done at or before the close of the evidence on both sides.¹

¹*Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

7. — exceptional cases.

But plaintiff cannot submit to a nonsuit against objection, where a claim by defendant for affirmative relief is well pleaded,¹ nor where plaintiff has already made a case which by statute entitles defendant to judgment.²

¹*Merchants' Bank v. Schulenberg*, 54 Mich. 49, 19 N. W. 741, 30 Alb. L. J. 22, and cases cited; *Grignon v. Black*, 76 Wis. 674, 45 N. W. 122, 938, and cases cited; *Sydnor Pump & Well Co. v. Rocky Mount Ice Co.* 125 N. C. 80, 34 S. E. 198. Especially where plaintiff has been refused permission to amend his reply so as to plead the statute of frauds against defendant's counterclaim, and his only object in taking

a nonsuit is to get an opportunity to so plead. *Yellow Pine Co. v. Lehigh Valley Creosoting Co.* 32 App. Div. 51, 52 N. Y. Supp. 281.

Otherwise, of a mere set-off, not involving any cross claim to relief. *Wooster v. Burr*, 2 Wend. 295; s. p. *Riley v. Carter*, 3 Humph. 230. Or of a mere defense, *Rumbough v. Young*, 119 N. C. 567, 26 S. E. 143.

²As in the case of an officer sued in the wrong county, and thereupon, under the statute, entitled to a verdict in his favor. *Hull v. Southworth*, 5 Wend. 265.

8. Withdrawal of juror.

A judge has power, in his discretion, in case of surprise or other cause which would render the progress of the trial unjust or unfair to either party, to withdraw a juror and postpone the trial.¹

¹*Dillon v. Cockcroft*, 90 N. Y. 649 (*arguendo*); *Glendening v. Canary*, 5 Daly, 489, Affirmed in 64 N. Y. 636, without opinion; *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, 48 How. Pr. 542, and cases cited (surprise); *People ex rel. Perkins v. Common Pleas Ct. Judges*, 8 Cow. 127 (defect in testimony); s. p. *St. John v. Duncan*, 2 N. Y. Month. L. Bull. 20 (defect in complaint). See also fully on this question, note to *Usborne v. Stephenson* (Or.) 48 L. R. A. 432, and *ante*, Division I., *Applications to Postpone*.

The English practice requires consent of parties.

Such a withdrawal is no ground for a judgment of nonsuit. *Planer v. Smith*, 40 Wis. 31.

Where the parties agree to withdraw a juror, each party pays his own costs.²

²Tidd, Pr. 2d Am. (from 8th Lond.) ed. 909.

XIX.—TAKING THE CASE FROM THE JURY.

[In some jurisdictions the mode of taking the case from the jury is, if at the instance of the plaintiff, by motion to direct a verdict; if at the instance of defendant, either by motion for a nonsuit, or by motion to direct a verdict, according to whether defendant is merely to put plaintiff out of court, or to have a final adjudication against him. In these jurisdictions a motion for nonsuit is also called a motion to dismiss the complaint, the latter designation being more usual where the dismissal is on the pleadings; the former where it is on the proofs.

In some other jurisdictions the mode of taking the case from the jury is only by directing a verdict at the instance of either party.

In still others it is by demurrer to evidence. The differences between these methods are to a great extent differences only in name and form of procedure; but there are consequent differences in the effect of the adjudication, which need not be noticed here.

The underlying principle of each of these methods is to dispose of the case by the decision of the judge if no proper question for the jury has been presented; and the rules which regulate the motion in either form and determine how it should be decided are in the main the same, and are here presented together as substantially applicable to all these modes of presenting the question; but with this noteworthy exception, that, according to the weight of authority, a motion for nonsuit or to direct a verdict, after the evidence of both parties has been heard and closed, is determined on the whole case; a demurrer to evidence is determined only on the evidence of the demurree].

A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. Power of the court.
2. Right of the party.
3. Test of the right to go to jury.

B. MODE OF APPLYING TO TAKE THE CASE FROM THE JURY.

4. Defendant's motion—when.
5. — after strict cross-examination.
6. — after full cross-examination.

7. — after final close of case.
 8. — several codefendants.
 9. — several coplaintiffs.
 10. — variance; several causes of action.
 11. — plaintiff's course to defeat motion.
 12. Plaintiff's motion for a verdict.
- C. RULES OF DECISION.
13. Contents of pleading to be considered together.
 14. General rule as to assuming truth of adversary's evidence.
 15. Sufficiency of evidence.
 16. Different inferences.
 17. Interested testimony.
 18. Party's admission by refusal to testify.
 19. Direct met by circumstantial evidence.
20. Affirmative testimony met only by negative.
 21. Positive met only by a conclusion of law.
 22. Uncontradicted evidence of specific fact.
 23. Expert testimony.
 24. Nominal damages.
 25. Mode of taking case from jury.
- D. VERDICT SUBJECT TO THE OPINION OF THE COURT (SPECIAL CASE).
26. When may be directed.
 27. Contest as to facts.
 28. Questions of evidence.
 29. Determining amount.
 30. Effect of consent.

A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. Power of the court.

Upon an undisputed state of facts¹ the court may render the judgment or direct the verdict which the law requires without the aid or advice of the jury.²

"Undisputed" here does not, however, mean that the counsel shall have ceased to contest; but that in contemplation of the law there should not be room for dispute.

And testimony cannot be said to be undisputed when inconsistent with some other fact or circumstance, either established, or regarding which testimony has been admitted. *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615, 49 N. W. 509.

A fact is legally in dispute, so as to require its submission to the jury, when its affirmation and denial are each supported by competent evidence of some probative force, or such evidence as, standing alone, would naturally and logically lead a reasonable mind to a definite conclusion as to the existence or nonexistence of such fact. *Rauber v. Sundback*, 1 S. D. 208, 46 N. W. 927.

And where there is positive evidence on both sides of an issue, it is an invasion of the province of the jury to withdraw the issue from the jury. *Union P. R. Co. v. James*, 12 U. S. App. 482, 56 Fed. Rep. 1001, 6 C. C. A. 217.

But the mere denial of inferences to be drawn from established facts cannot raise a dispute of facts to go to the jury. *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 121. See also *infra*, § 19.

¹*Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed 855; *Bemis v. Woodworth*, 49

Iowa, 340; *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319 (where it was held no error to recall the jury and direct a verdict for defendant); *Thomasson v. Groce*, 42 Ala. 431; *Chenery v. Palmer*, 6 Cal. 119, 122; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Cutler v. Hurlbut*, 29 Wis. 152, 165; *Thompson v. Etowah Iron Co.* 91 Ga. 538, 17 S. E. 663 (where it was held no error to direct a verdict after the court, on deciding that plaintiff had failed to establish his case, had announced its intention to so direct a verdict, thus giving plaintiff an opportunity to dismiss or take a nonsuit, neither of which he does); *Wabash R. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb. 306, 49 N. W. 362; *McCormack v. Standard Oil Co.* 60 N. J. L. 243, 37 Atl. 617; *Fromherz v. Yankton F. Ins. Co.* 7 S. D. 187, 63 N. W. 784; *Corley v. Lenz* (Tex. Civ. App.) 24 S. W. 935. See also note to *People v. People's Ins. Exchange* (Ill.) 2 L. R. A. 340.

"In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. ed. 780, 782, and cases cited; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235, and cases cited.

This rule requires, not merely undisputed testimony, but an undisputed state of facts; for if differences of fact may be drawn from undisputed testimony the case raises a question that the jury ought to pass upon. See *infra*, § 16.

And in those jurisdictions where the "scintilla of evidence" doctrine prevails the court cannot take the case from the jury where there is any evidence tending to prove the issue. *Robinson v. Louisville & N. R. Co.* 2 Lea, 594.

Withdrawing the case from the jury and directing verdict for the proper party upon such an undisputed state of facts is no invasion of a constitutional prohibition that judges shall not charge juries with regard to matters of fact, but shall declare the law. *Jones v. Chalfant* (Cal.) 31 Pac. 257. But is in fact a compliance therewith. *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062.

And the power of the court to withdraw the case from the jury in a proper case extends to actions of libel and slander, as in other civil cases, notwithstanding a constitutional provision making the jury, under the direction of the court, the judges of the law and the facts in libel and slander suits. *Hazy v. Voitke*, 23 Colo. 556, 48 Pac. 1048.

So, a statute making the question of fraudulent intent one of fact does not affect the power of the court to direct a verdict in a case involving that question, if it is otherwise proper to direct a verdict. *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96.

And the court does not lose control over the jury because they have retired to the jury room, under its direction, to deliberate on their verdict; but it may, in the further conduct of the trial, recall them and direct them to render a proper verdict. *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088.

And it would seem from *Schechter v. Denver, L. & G. R. Co.* 8 Colo. App. 25, 44 Pac. 761, the court may, in a proper case, order an involuntary nonsuit of its own motion. Or direct the proper verdict. *Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36. Otherwise in Washington, except for abandonment of the case by the plaintiff, his refusal to make necessary parties, or his disobedience of an order concerning the proceedings in the action. *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209.

In North Carolina the court can never find nor direct an affirmative finding by the jury. The most the court can do is to instruct the jury, where there is no dispute in the evidence, that if they believe the evidence they should find yes or no, as the case may be. Where there is no evidence, or no such evidence as should be allowed to go to the jury, tending to establish the affirmative of the issue, the court should direct the negative finding. *White v. Suffolk & C. R. Co.* 121 N. C. 484, 27 S. E. 1002, and cases cited. See also *infra*, §§ 2, 12.

For the various methods in which the rule in the text is applied in different jurisdictions, see note to next section.

2. Right of the party.

In a case where it is proper to take the case from the jury, the right of the party and the power of the judge are correlative; the right implies the duty.¹

¹*Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. ed. 780, 782, and cases cited; *Lomer v. Meeker*, 25 N. Y. 361.

The reason is that the judge, if he understands the law applicable to the case, ought to protect parties against unjust verdicts, and ought not to occupy the jury, the parties, and the public time in reaching a verdict (or possibly a disagreement) in a case where, if a verdict adverse to his opinion were reached, it would forthwith be his duty to set it aside on motion for new trial.

The following analysis of the authorities shows in what jurisdictions this rule is now established; and in what it has been denied or qualified:

United States courts—Formerly, compulsory nonsuit after evidence taken was held, by the supreme court, not allowable in the Federal courts. *Schuchardt v. Allen*, 1 Wall. 359, 17 L. ed. 642. Even though the practice in the state court was otherwise. *Elmore v. Grymes*, 1 Pet. 469, 7 L. ed. 224. And it is still so held by some of the circuit courts of appeals. *Northern P. R. Co. v. Charless*, 7 U. S. App. 359, 51 Fed. Rep. 562, 2 C. C. A. 380. But in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, Mr. Justice Field characterized the difference between a motion to nonsuit and a motion to direct a verdict, as "rather a matter of form than of substance." And in *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 34, 35 L. ed. 60, 11 Sup. Ct. Rep. 478, it was expressly held that a Federal court could, in a proper case, nonsuit plaintiff against his objection, if that was the proper practice in the courts of the state in which it was sitting. And this doctrine was affirmed in *Coughran v. Bigelow*, 164 U. S. 301, 41 L. ed. 442, 17 Sup. Ct. Rep. 117. None of these cases, however, question the power and duty

of the court to withdraw the case from the jury, and the right of the defendant to have it done, in a proper case. Indeed, as was said in *Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92, "the legal sufficiency of the evidence to support the verdict presents a question of law, the decision of which is not a matter of discretion, but of duty, and is as much the subject of exception and review as any other ruling of the court in the course of the trial." See also *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. ed. 827 (direction of a verdict is a matter of right in a proper case); *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 102, Fed. Cas. No. 9,448; *Retzer v. Wood*, 109 U. S. 185, 27 L. ed. 900, 3 Sup. Ct. Rep. 164 (error to refuse to direct a verdict for plaintiff on a proper case); *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489, 492.

Alabama—*Smith v. Seaton*, Minor (Ala.) 75 (in absence of statute court has no power to grant compulsory nonsuit, but may direct the jury how to find; and if they disobey may grant new trial); *Saunders v. Coffin*, 16 Ala. 421; *Gluck v. Cox*, 90 Ala. 331, 8 So. 161 (demurrer to evidence allowed as matter of right in all civil cases); *Louisville & N. R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796 (error to refuse general affirmative charge in a proper case). But a general affirmative charge at the close of all the evidence is properly refused where a demurrer to his adversary's evidence by the party requesting it could not have been legally sustained. *Central R. & Bkg. Co. v. Roquemore*, 96 Ala. 236, 11 So. 475. See *infra*, § 7.

Arizona—*Bryan v. Pinney* (Ariz.) 21 Pac. 332; *Roberts v. Smith* (Ariz.) 52 Pac. 1120 (where it is held that involuntary nonsuit cannot be granted under the Arizona statutes, but the court may, in a proper case, direct a verdict. These cases base this doctrine on the former doctrine of the United States Supreme Court. See United States court cases, *supra*).

Arkansas—*Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363 (court has no power to grant compulsory nonsuit, but may direct jury to find as in case of nonsuit); *Hill v. Rucker*, 14 Ark. 706 (such a verdict bars a future action); *Obaugh v. Finn*, 4 Ark. 110, 37 Am. Dec. 773 (demurrer to evidence: *dictum* that in proper case it is a matter of legal right); *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062 (duty of court to permit plaintiff to take a nonsuit if the missing links in his evidence can probably be supplied; otherwise, to direct verdict against party whose evidence is legally insufficient to support a verdict for him).

California—*Dalrymple v. Hanson*, 1 Cal. 125 (nonsuit; error to refuse); *Johnson v. Moss*, 45 Cal. 515; *Selden v. Cashman*, 20 Cal. 56 (direction of a verdict granted in a proper case); *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227 (direction of verdict upheld as proper in the particular case, but the practice is characterized as hazardous, and to be sanctioned only in the clearest cases); *Downing v. Murray*, 113 Cal. 455, 45 Pac. 869 (nonsuit); *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635 (direction of verdict proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had).

Colorado—*Murray v. Denver & R. G. R. Co.* 11 Colo. 124, 17 Pac. 484 (nonsuit; Code Civ. Proc. § 48); *Union Coal Co. v. Edman*, 16 Colo. 438, 27 Pac. 1060 (error to refuse to direct verdict, in the absence of motion for nonsuit or other relief); *Stratton v. Union P. R. Co.* 7 Colo. App. 126, 42 Pac. 602 (nonsuit not the privilege, but the duty, of the court, in a proper case).

Connecticut—*Naugatuck R. Co. v. Waterbury Button Co.* 24 Conn. 468 (nonsuit authorized by a statute which is held not to be unconstitutional as violating the right of trial by jury); *Fitch v. Bill*, 71 Conn. 24, 40 Atl. 910 (nonsuit authorized by statute if prima facie case not established); *Ward v. Metropolitan L. Ins. Co.* 66 Conn. 227, 33 Atl. 902 (direction of verdict, duty of court in proper case, and error to refuse). But according to *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994, nonsuit is never a matter of right, and should rarely, if ever, be granted where there can be any doubt, unless the evidence of the plaintiff distinctly raises a question of law determinative of the plaintiff's right of action. Where the granting must depend in any appreciable degree upon the court's passing upon the credibility of witnesses, the nonsuit should not be granted. And ordinarily, as a matter of practice, where the nonsuit can settle no principle of law essential to the plaintiff's right of action, the consideration of ending the litigation by the verdict of a jury should control, and the trial should go on; and the statute should not be extended, even where the evidence on its face is extremely improbable, so as to permit a nonsuit in any case where the facts claimed as presenting the question of law may depend upon the credit to be given witnesses, or may depend upon inferences to be drawn from testimony, as to which inferences the parties may reasonably differ.

Dakota—*Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689 (compulsory nonsuit not allowed); *Territory v. Stone*, 2 Dak. 155, 4 N. W. 697 (direction of verdict proper when evidence is not sufficient to sustain a contrary verdict).

Delaware—*Flanagan v. Wilmington*, 4 Houst. (Del.) 548 (compulsory nonsuit allowed).

District of Columbia—*Jackson v. Merritt*, 21 D. C. 276 (compulsory nonsuit not allowed in courts of the District; but the court should, in a proper case, direct the jury as to their verdict); *Somerville v. Knights Templars & M. Life Indemnity Asso.* 11 App. D. C. 417, and cases cited (direction of verdict in a proper case).

Florida—*Hinote v. Simpson*, 17 Fla. 444 (demurrer to evidence seems allowable in proper cases); *C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878 (direction of verdict allowable by statute in proper case).

Georgia—*Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708 (nonsuit); *Hanson v. Crawley*, 51 Ga. 528, 533 (direction of verdict for defendant at close of plaintiff's case is not proper; but a motion for a nonsuit at that stage of the trial is the proper way to raise the question of sufficiency of plaintiff's evidence; *Moon v. Fink*, 102 Ga. 526, 28 S. E. 980 (nonsuit); *Stewart v. Bank of Social Circle*, 100 Ga. 496, 28 S. E. 249 (direction of verdict).

Idaho—*Spokane & P. R. Co. v. Holt* (Idaho) 40 Pac. 56 (direction of verdict; error to refuse in a proper case); *Lewis v. Lewis* (Idaho) 33 Pac. 38 (nonsuit, by statute, in proper case). But to direct verdict for de-

feudants is error where plaintiff refuses to introduce evidence to prove his case, and defendants fail to produce evidence to prove their cross-demand against plaintiff. The action in such case should be dismissed, or a judgment of nonsuit entered. *Simmons v. Cunningham* (Idaho) 39 Pac. 1109.

Illinois—*Holmes v. Chicago & A. R. Co.* 94 Ill. 439, 444 (nonsuit seems allowable only at close of plaintiff's case, upon an entire failure of evidence as to an essential point. Motion to exclude all of the plaintiff's evidence is an equivalent remedy). Compare *Poleman v. Johnson*, 84 Ill. 269 (where the power of the court to nonsuit under the Illinois statute is questioned, but it is held error to deny motion to exclude all of the plaintiff's evidence upon an entire failure of proof on an essential point. Direction of verdict for defendant is a matter of right in such a case); *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (motion to exclude plaintiff's evidence is in the nature of a demurrer to evidence and is tested by the same rules); *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163, and cases cited (direction of verdict not error in proper case. If made at close of plaintiff's testimony, the only question raised is whether or not there is evidence tending to prove averments of declaration, but if made at close of all the evidence, the evidence for both plaintiff and defendant, with all proper inferences deducible therefrom, must be insufficient to support verdict for plaintiff). But a peremptory instruction for defendant, asked along with a series of instructions submitting all the facts to the jury, is properly refused. *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701.

Indiana—*Williams v. Port*, 9 Ind. 551 (compulsory nonsuit not allowed); *Booe v. Davis*, 5 Blackf. 115, 33 Am. Dec. 457; *Purcell v. English*, 86 Ind. 34; *Crookshank v. Kellogg*, 8 Blackf. 256 (direction of verdict. Error to refuse); *Strough v. Gear*, 48 Ind. 100 (demurrer to evidence allowable under Indiana Code of Procedure); *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624 (direction of verdict duty in proper case); *Stroble v. New Albany*, 144 Ind. 695, 42 N. E. 806 (proper practice to ask for direction of verdict, not withdrawal of case from jury); *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242 (nonsuit not allowable).

Iowa—*Way v. Illinois C. R. Co.* 35 Iowa, 585 (compulsory nonsuit not allowable by Iowa Rev. Stat. §§ 3127, 3128); *Bemis v. Woodworth*, 49 Iowa, 340 (direction of a verdict proper on undisputed evidence); *Hurd v. Neilson*, 100 Iowa, 555, 69 N. W. 867 (direction of verdict; error to refuse in proper case); *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235 (direction of verdict).

Kansas—*Case v. Hannahs*, 2 Kan. 490 (compulsory nonsuit not authorized by the Kansas Code. In case of total failure of proof on an essential point the court should so instruct the jury); *Union P. R. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, and cases cited (error not to sustain demurrer to evidence); *Wisner v. Bias*, 43 Kan. 458, 23 Pac. 586 (demurrer to evidence; error not to sustain in proper case).

Kentucky—*Parker v. Jenkins*, 3 Bush, 588 (error to refuse to direct verdict where defense was established by uncontradicted evidence); *Hanks v.*

Roberts, 3 J. J. Marsh. 298 (error to refuse to direct where evidence would not sustain a contrary verdict); *Wilsey v. Louisville & N. R. Co.* 83 Ky. 512 (peremptory instruction proper on plaintiff's evidence alone, and also on all evidence if all is in favor of party moving; but if evidence is conflicting, case cannot be withdrawn from jury by demurrer to evidence); *Louisville, St. L. & T. R. Co. v. Terry*, 20 Ky. L. Rep. 803, 47 S. W. 588 (peremptory instruction; error to refuse in proper case); *Buford v. Louisville & N. R. Co.* 82 Ky. 286; *Thompson v. Thompson*, 17 B. Mon. 28.

Louisiana—*Wilson v. McHugh*, 1 La. 380 (nonsuit proper if evidence is insufficient); *Taylor v. Almada*, 50 La. Ann. 351, 23 So. 365 (nonsuit).

Maine—*White v. Bradley*, 66 Me. 254 (nonsuit on uncontradicted evidence raising only question of law held proper); *Heath v. Jaquith*, 68 Me. 433, 436 (direction of a verdict proper when evidence will not authorize a verdict for opposite party); *State v. Soper*, 16 Me. 293 (demurrer on evidence unusual and no error to refuse to receive it); *Woodstock v. Canton*, 91 Me. 62, 39 Atl. 281 (direction of verdict proper when evidence will not authorize verdict for the party).

Maryland—*Kettlewell v. Peters*, 23 Md. 312 (nonsuit not adopted and contrary to practice); *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291 (error to refuse to direct verdict when there is no evidence to sustain contrary verdict); *Northern C. R. Co. v. Medairy*, 86 Md. 168, 37 Atl. 796 (direction of verdict; error to refuse if evidence insufficient to sustain contrary verdict).

Massachusetts—*Mitchell v. New England Marine Ins. Co.* 6 Pick. 117, 118; *Marshall v. Merritt*, 97 Mass. 516 (it seems that a nonsuit cannot be ordered against the plaintiff's consent. Compare, however, *Wentworth v. Leonard*, 4 Cush. 414, 418, Shaw, Ch. J.); *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *Denny v. Williams*, 5 Allen, 1; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Tully v. Fitchburg R. Co.* 134 Mass. 499 (direction of a verdict. Error to refuse in a proper case); *Copeland v. New England Ins. Co.* 22 Pick. 135, 143 (demurrer to evidence seems matter of right, but that it is rarely resorted to in Massachusetts practice, see *Golden v. Knowles*, 120 Mass. 336); *Kennecson v. West End Street R. Co.* 168 Mass. 1, 46 N. E. 114 (direction of verdict).

Michigan—*Cahill v. Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 124 (court cannot compel nonsuit); *Grand Trunk R. Co. v. Nichol*, 18 Mich. 170 (direction of a verdict; error to refuse where there is no conflicting evidence); *Secord v. Chicago & M. L. S. R. Co.* 107 Mich. 540, 65 N. W. 550 (direction of verdict; error to refuse in proper case).

Minnesota—*McCormick v. Miller*, 19 Minn. 443, Gil. 384 (compulsory nonsuit allowed by statute); *Gierrmann v. St. Paul, M. & M. R. Co.* 42 Minn. 5, 43 N. W. 483 (direction of verdict proper if on all the evidence a verdict for plaintiff would not be allowed to stand, though on plaintiff's evidence alone the case should go to the jury).

Mississippi—*Winston v. Miller*, 12 Smedes & M. 550, 554 (no power of compulsory nonsuit, but there is an equivalent remedy in directing a verdict against the plaintiff); *Ewing v. Glidwell*, 3 How. (Miss.) 332, 335 (no power to nonsuit, but court may instruct jury to find a verdict as in case of nonsuit, and this is often done); *Chicago, St. L. & N. O. R. Co. v.*

Doyle, 60 Miss. 977 (direction of verdict seems matter of right in a proper case); *Capital City Oil Works v. Black*, 70 Miss. 8, 12 So. 26 (direction of verdict; error to refuse in proper case).

Montana—*Morse v. Granite County Comrs.* 19 Mont. 450, 48 Pac. 745 (nonsuit); *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675 (direction of verdict in effect a nonsuit).

Nebraska—*Smith v. Sioux City & P. R. Co.* 15 Neb. 583, 19 N. W. 638 (compulsory nonsuit not authorized by Neb. Code, § 430. Error to grant it); *Atchison & N. R. Co. v. Loree*, 4 Neb. 446 (direction of a verdict. Error to refuse); *Knatt v. Jones*, 50 Neb. 490, 70 N. W. 90 (direction of verdict); *Zittle v. Schlesinger*, 46 Neb. 844, 65 N. W. 892 (compulsory nonsuit not authorized by Civ. Code, § 430, and, though error to grant, not fatal if evidence such that verdict should have been directed for defendant).

Nevada—Gen. Stat. § 3173, Civ. Pr. Act, § 151 (nonsuit allowed by statute when the plaintiff fails to prove a sufficient case for the jury). See *Laird v. Morris*, 23 Nev. 34, 42 Pac. 11.

New Hampshire—*Stickney v. Stickney*, 21 N. H. 61 (nonsuit; error to refuse); *Bailey v. Kimball*, 26 N. H. 351, 354; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205 (nonsuit; error to refuse); *Dame v. Dame*, 20 N. H. 28 (direction of a verdict proper for insufficient evidence); *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558 (nonsuit; error to refuse).

New Jersey—*New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 436, 97 Am. Dec. 722 (nonsuit; error to refuse); *Baldwin v. Shannon*, 43 N. J. L. 596 (direction of a verdict proper where a verdict for opposite party would be set aside); *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662 (direction of verdict; error to refuse in proper case); *New Jersey School & Church Furniture Co. v. Somerville Bd. of Edu.* 58 N. J. L. 646, 35 Atl. 397 (nonsuit in proper case).

New Mexico—*Herrera v. Chaves*, 2 N. M. 86; *Montoya v. Donohoe*, 2 N. M. 214 (compulsory nonsuit cannot be granted); *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 912 (direction of verdict).

New York—*Lomer v. Meeker*, 25 N. Y. 361 (motion for nonsuit or to dismiss complaint, or to direct verdict; error to refuse); *Robinson v. McManus*, 4 Lans. 380, 386; *Fish v. Davis*, 62 Barb. 122; *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253, 261 (motion to direct verdict equivalent to motion for nonsuit, but note that it is more serious in results); *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342 (motion for nonsuit or to direct verdict; duty of court to grant in proper case); *Williams v. United States Mut. Acci. Asso.* 133 N. Y. 366, 31 N. E. 222 (dismissal of complaint; error to refuse in proper case); *Dennison v. Musgrave*, 20 Misc. 678, 46 N. Y. Supp. 530 and cases cited (stating the practice of taking the case in New York to be thus: If at the instance of plaintiff by motion to direct verdict; if at the instance of defendant by motion for nonsuit or to direct verdict, according to whether final adjudication against him). And a justice of the New York city district court should direct a verdict where it would be the duty of a judge of a court of record to do so, under the New York city consolidation act, § 1381, providing that

the mode of conducting the trial is the same in such courts as in courts of record. *Douglass v. Seiford*, 18 Misc. 188, 41 N. Y. Supp. 289.

North Carolina—*Wittkowsky v. Wasson*, 71 N. C. 451 (scintilla of evidence not enough to go to the jury); *Hygienic Plate Ice Co. v. Raleigh & G. R. Co.* 122 N. C. 881, 29 S. E. 575 (nonsuit under act 1897, chap. 109); *Cable v. Southern R. Co.* 122 N. C. 892, 29 S. E. 377 (direction of verdict a duty if there is no evidence, or nothing more than mere scintilla of evidence).

North Dakota—*McCormick Harvesting Mach. Co. v. Larson*, 6 N. D. 533, 72 N. W. 921 (direction of verdict).

Ohio—*Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610 (compulsory nonsuit allowed only on an entire failure of evidence as to some essential point. Substituted for the ancient practice of demurrer to evidence); *Powell v. Jones*, 12 Ohio, 35; *Grant v. Pittsburg & W. R. Co.* 10 Ohio C. C. 362 (immaterial whether verdict directed, or case taken from jury and judgment of dismissal entered).

Oklahoma—*Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495 (demurrer to evidence).

Oregon—*Tippin v. Ward*, 5 Or. 450 (compulsory nonsuit); *Cogswell v. Oregon & C. R. Co.* 6 Or. 417; *Willis v. Holmes*, 28 Or. 583, 42 Pac. 988 (nonsuit).

Pennsylvania—*Lehman v. Kellerman*, 65 Pa. 489 (compulsory nonsuit, but error will not lie to a refusal; for defendant may ask for direction that plaintiff's evidence is insufficient to maintain his action); *Ritzman v. Philadelphia & R. R. Co.* 187 Pa. 337, 40 Atl. 975 (nonsuit; duty of court); *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746 (nonsuit in effect a demurrer to evidence; should not be withdrawn from jury if there is any evidence beyond a mere scintilla, however slight, from which jury can draw inference favorable to plaintiff); *Du Bois Deposit Bank v. Kuntz*, 175 Pa. 432, 34 Atl. 797 (direction of verdict for plaintiff in a proper case). See also *Easton v. Neff*, 102 Pa. 474; *Hyatt v. Johnston*, 91 Pa. 196 (direction of verdict; error to refuse plaintiff in this case).

Rhode Island—*Hopkins v. Brown*, 5 R. I. 360 (compulsory nonsuit seems to be allowed only where there is total lack of evidence on an essential point); *Cassidy v. Angell*, 12 R. I. 447, 448, 34 Am. Rep. 690.

South Carolina—*Carrier v. Dorrance*, 19 S. C. 30 (compulsory nonsuit only allowed on entire failure of evidence as to some essential point. Then error to refuse); *Graham v. Moore*, 13 S. C. 115 (direction of a verdict a duty in a proper case); *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655 (compulsory nonsuit allowable at close of all evidence).

South Dakota—*McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053 (direction of verdict).

Tennessee—*Littlejohn v. Fowler*, 5 Coldw. 284 (nonsuit said to be unconstitutional); *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 582 (motion to exclude plaintiff's evidence on ground that it would not support a verdict in his favor, not proper practice); *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 409, 32 L. R. A. 354, 34 S. W. 1029 (demurrer to evidence not unconstitutional as violating the right of trial by jury or the prohibition that judges shall not charge

juries with respect to matters of fact. An exhaustive comparison of the practice in the various jurisdictions is here found).

Texas—*Guest v. Guest*, Dallam (Tex.) 394; *McGill v. Delaplain*, Dallam (Tex.) 493 (court cannot compel a nonsuit); *Willis v. Bullitt*, 22 Tex. 330 (direction of a verdict in a proper case); *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059 (direction of verdict a duty in proper case); *Galveston, H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066 (demurrer to evidence).

Utah—*Fowler v. Pleasant Valley Coal Co.* 16 Utah, 348, 52 Pac. 594 (compulsory nonsuit; error to refuse in proper case).

Vermont—*Smith v. Crane*, 12 Vt. 487 (court cannot order nonsuit; error to do so); *Wright v. Bourdon*, 50 Vt. 494 (direction of a verdict in a proper case); *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992 (direction of verdict).

Virginia—4 Minor, Inst. p. 782 (courts cannot compel nonsuit. Citing *Ross v. Gil*, 1 Wash. (Va.) 87, 89; *Thweat v. Finch*, 1 Wash. (Va.) 217, 219); *Trout v. Virginia & T. R. Co.* 23 Gratt. 619 (demurrer to evidence seems a matter of right); *Eubank v. Smith*, 77 Va. 206 (demurrer to evidence; court has the power to compel joinder in a proper case); *Childress v. Chesapeake & O. R. Co.* 94 Va. 186, 26 S. E. 424 (demurrer to evidence). But in an action for libel it is improper for the trial court to compel plaintiff to join in demurrer to the evidence, under Va. Code 1873, chap. 145, § 2, which provides that no demurrer shall preclude a jury from passing on the alleged insulting words. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

Washington—*Starr v. Chilberg*, 15 Wash. 700, 47 Pac. 10 (nonsuit); *Dunkle v. Spokane Falls & N. R. Co.* 20 Wash. 254, 55 Pac. 51 (motion to discharge the jury and for proper judgment to be entered on verdict found by court, in conformity with Ballinger's Code, § 4994 [Sess. Laws 1895, p. 64, § 17]).

West Virginia—*Allen v. Bartlett*, 20 W. Va. 46 (demurrer to evidence); *Overby v. Chesapeake & O. R. Co.* 37 W. Va. 524, 16 S. E. 813 (motion to exclude all plaintiff's evidence at the close of his case not allowable); *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999 (direction of verdict after giving plaintiff an opportunity to suffer nonsuit; error to refuse in proper case); *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888 (demurrer to evidence, in which court may compel other party to join).

Wisconsin—*Hunter v. Warner*, 1 Wis. 141; *Hoeflinger v. Stafford*, 38 Wis. 391 (compulsory nonsuit; error to refuse); *Jackson v. Jacksonport*, 56 Wis. 310, 14 N. W. 296 (direction of a verdict proper when evidence, considered as undisputed, and aided by most favorable legitimate construction and all reasonable inferences, would not justify a contrary verdict); *Wickham v. Chicago & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982 (direction of verdict).

Wyoming—*Mulhern v. Union P. R. Co.* 2 Wyo. 465 (compulsory nonsuit cannot be ordered).

See further on this question, notes to *People v. People's Ins. Exchange* (Ill.) 2 L. R. A. 340, and *Grube v. Missouri P. R. Co.* (Mo.) 4 L. R. A. 776.

3. Test of the right to go to jury.

The general test as to the propriety of refusing to submit a point to the jury is whether their verdict on the point, if against the moving party, must be set aside as contrary to or against the weight of evidence.¹

¹United States courts—*Pleasants v. Fant*, 22 Wall. 116, 121, 22 L. ed. 780, 782; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Phœnix Mut. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Montclair v. Dana*, 107 U. S. 162, 27 L. ed. 436, 2 Sup. Ct. Rep. 403; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Adams v. Spangler*, 5 McCrary, 334, 17 Fed. Rep. 133; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Bagley v. Cleeland Rolling Mill Co.* 22 Blatchf. 342, 21 Fed. Rep. 159; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489 (where it is held to be the duty of the court to direct a verdict for the plaintiff if a verdict for the defendant would be set aside as contrary to evidence); *Proffatt, Jury Trial*, § 354, and cases cited; *St. Louis & S. F. R. Co. v. Whittle*, 40 U. S. App. 23, 74 Fed. Rep. 296, 20 C. C. A. 196 (where it is held that no court is required to take the chances of a verdict being rendered which, if rendered, it would deem itself bound to set aside as wholly unsupported by evidence); *McPeck v. Central Vermont R. Co.* 50 U. S. App. 27, 79 Fed. Rep. 590, 25 C. C. A. 110, and cases cited. But *Mount Adams & E. P. Inclined R. Co. v. Lowry*, 43 U. S. App. 408, 74 Fed. Rep. 463, 20 C. C. A. 596, draws a distinction between the legal discretion of the court to set aside a verdict as against the evidence and the duty of the court to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence, and holds that the test stated in the text is not the proper one, but that to support a refusal to submit a point to the jury the evidence must be so insufficient in fact as to be insufficient in law, amounting to an absence of any material and substantial evidence which, if credited by the jury, would in law justify a verdict for the other party, and that it is the judge's duty on a motion to direct a verdict to take that view of the evidence most favorable to the party against whom it is moved to find, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for the party having the onus; but that it certainly is not his function to weigh the evidence for the purpose of saying how the verdict should go, as it is on a motion for a new trial. See also *Vany v. Pierce*, 54 U. S. App. 196, 82 Fed. Rep. 162, 26 C. C. A. 521.

Arizona—*Root v. Fay* (Ariz.) 43 Pac. 527.

California—*Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 594, 49 Pac. 714; *Dalrymple v. Hanson*, 1 Cal. 125; *Ensminger v. McIntire*, 23 Cal. 593, 594.

Colorado—*Chivington v. Colorado Springs Co.* 9 Colo. 597, 14 Pac. 212.

Connecticut—The test would seem to be the same in Connecticut. Compare *Booth v. Hart*, 43 Conn. 480, 484, with *Osborne v. Bradley*, 46 Conn. 405,

466. According to *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994, a motion for a nonsuit cannot be permitted to operate as a motion to set aside the verdict as against the evidence, though the court may set aside a verdict rendered upon the same evidence upon which it has already refused to grant a nonsuit.

Dakota—*Territory v. Stone*, 2 Dak. 155, 4 N. W. 697.

District of Columbia—*Somerville v. Knights Templars & M. Life Indemnity Co.* 11 App. D. C. 417, and cases cited. But according to *Warthen v. Hammond*, 5 App. D. C. 167, where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the revisory power of the court to order a retrial.

Florida—*C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878.

Georgia—*Burnam v. DeVaughn*, 65 Ga. 309; *Zettler v. Atlanta*, 66 Ga. 195.

Illinois—*Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, and cases cited.

Indian Territory—*Chicago, R. I. & P. R. Co. v. Driggers* (Ind. Terr.) 45 S. W. 124, and cases cited.

Indiana—*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Wolfe v. McMillan*, 117 Ind. 587, 20 N. E. 509.

Iowa—*Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235. And see *Guthrie v. Dubuque*, 105 Iowa, 653, 75 N. W. 500 (where it is held that a motion for the direction of a verdict by the party having the burden should be denied unless, considering all the evidence, it clearly would be the duty of the court to set aside a verdict for the other party); *Hurd v. Neilson*, 100 Iowa, 555, 69 N. W. 867.

Kansas—This does not seem to be the test in Kansas. But according to *Brown v. Atchison, T. & S. F. R. Co.* 31 Kan. 1, 1 Pac. 605, the rule of practice is, that the trial court in order to withdraw the case from the jury must be able to say that, admitting every fact that is proved, which is favorable to the party having the burden, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the party having the burden, still he has utterly failed to establish some one or more of the material elements essential to a recovery by him. See also *St. Louis & S. F. R. Co. v. Toomey*, 6 Kan. App. 410, 49 Pac. 819. And *Sullivan v. Phenix Ins. Co.* 34 Kan. 170, 8 Pac. 112, expressly repudiated the test laid down above, and follows the rule in the *Brown Case*. But see *Emerson v. Thatcher*, 6 Kan. App. 325, 51 Pac. 50, where it was held that a verdict was properly directed on undisputed evidence of one party entitling him to a recovery, although the other party had adduced some evidence in his own behalf, and that a refusal to direct a verdict would have been error; the court saying that had the trial court submitted the case to the jury, and had the jury returned a verdict other than that directed, it would have been the duty of the court to have set aside the verdict and granted a new trial.

Kentucky—This is not the test in Kentucky. *Buford v. Louisville & N. R. Co.* 82 Ky. 286; *Thompson v. Thompson*, 17 B. Mon. 28.

Maine—*Brown v. European & N. A. R. Co.* 58 Me. 384; *Heath v. Jaquith*, 68 Me. 433, 436; *Bennett v. Talbot*, 90 Me. 229, 38 Atl. 112. Compare, however, *Union State Co. v. Tilton*, 69 Me. 244.

Maryland—This seems to be substantially what the Maryland court means when it says that a case must go to the jury where there is evidence which, if believed, is legally sufficient to sustain a verdict for either party. See *State use of Steever v. Union R. Co.* 70 Md. 69, 18 Atl. 1032; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859.

Massachusetts—In Massachusetts, the rule as laid down in *Denny v. Williams*, 5 Allen, 1, and apparently approved in *Brooks v. Somerville*, 106 Mass. 271, 275, is that "if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that though one or two verdicts rendered upon it would be set aside upon motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under proper instructions." See also *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088.

Minnesota—*Giermann v. St. Paul, M. & M. R. Co.* 42 Minn. 5, 43 N. W. 483, and cases cited; *Thompson v. Pioneer-Press Co.* 37 Minn. 285, 43 N. W. 856.

Mississippi—*Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Smith v. Fonda*, 64 Miss. 551, 1 So. 757.

Missouri—*Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *Hite v. Metropolitan Street R. Co.* 130 Mo. 140, 32 S. W. 33; *Adams County Bank v. Hainline*, 67 Mo. App. 483 (holding that a case should not be submitted where the verdict would not be allowed to stand if rendered against the evidence, although there is a mere scintilla of evidence).

Montana—*Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697 (nonsuit should be granted if, in view of all the evidence introduced by plaintiff, the court would grant a new trial if the jury should bring in a verdict in his favor).

Nebraska—*Atchison & N. R. Co. v. Lorce*, 4 Neb. 446; *Reynolds v. Burlington & M. R. Co.* 11 Neb. 186, 7 N. W. 737; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19, and cases cited.

New Hampshire—*Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205 (where it is also said that in applying the test it does not seem to be material whether the motion (for a nonsuit) is made at the close of the plaintiff's case, or whether it is delayed till all the evidence is in).

New Jersey—*Aycrigg v. New York & E. R. Co.* 30 N. J. L. 460; *Baldwin v. Shannon*, 43 N. J. L. 596; *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662 (where it is held that the test is whether the evidence is such that the court would set aside any number of verdicts rendered against it).

New Mexico—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 912.

New York—*Cagger v. Lansing*, 64 N. Y. 417, Aff'g 4 Hun, 812; *Corning v. Troy Iron & Nail Factory*, 44 N. Y. 577, 594; *Neuendorff v. World Mut. L. Ins. Co.* 69 N. Y. 389; *Burt v. Smith*, 83 N. Y. 606 (no opinion); *Fish v. Davis*, 62 Barb. 122; *Wombough v. Cooper*, 2 Hun, 428, 4 Thomp. & C. 586; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342. And a case of negligence forms no exception to the rule. *Wilds v. Hud-*

son River R. Co. 24 N. Y. 430. But see *Bagley v. Bowe*, 105 N. Y. 171, 11 N. E. 386, and *Luhrs v. Brooklyn Heights R. Co.* 11 App. Div. 173, 42 N. Y. Supp. 606, 13 App. Div. 126, 42 N. Y. Supp. 1101 (where it is held that the court cannot withdraw from the jury the ultimate decision of a fact unless the fact is either uncontradicted or the contradiction is illusory, or where the answering evidence is a scintilla merely).

North Dakota—This is the rule, it seems, in North Dakota. See *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710 (where it is held that a verdict can be directed against a party only where his testimony, considered as undisputed, and given the most favorable construction for him, together with all reasonable inferences therefrom, cannot legally sustain a verdict in his favor).

Oregon—*Grant v. Baker*, 12 Or. 329, 7 Pac. 318.

Pennsylvania—*Hyatt v. Johnston*, 91 Pa. 196; *McEwen v. Hoopes*, 175 Pa. 237, 34 Atl. 623.

South Dakota—*McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053.

Texas—*International & G. N. R. Co. v. Hall*, 12 Tex. Civ. App. 11, 33 S. W. 127. According to *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059, the case should not be submitted, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established, such testimony in legal contemplation falling short of being any evidence; and the court must determine whether the testimony has more than that degree of probative force.

Utah—*Bowers v. Union P. R. Co.* 4 Utah, 215, 7 Pac. 251.

Virginia—*Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944.

Washington—*Starr v. Chilberg*, 15 Wash. 700, 47 Pac. 10.

Wisconsin—*Hunter v. Warner*, 1 Wis. 141; *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894; *Jackson v. Jacksonport*, 56 Wis. 310, 14 N. W. 296.

B. MODE OF APPLYING TO TAKE THE CASE FROM THE JURY.

4. Defendant's motion—when.

Neither a nonsuit,¹ nor a direction of a verdict² for the defendant, nor a demurrer to evidence,³ is proper before the plaintiff has closed his case.⁴

But a motion to dismiss for insufficiency of the complaint may be made at any stage of the case⁵ before evidence of the necessary facts omitted to be alleged has been received without specific objection.⁶

¹*Walker v. Supple*, 54 Ga. 178; *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746; *Nixon v. Brown*, 4 Blackf. 158.

²*Miller v. House*, 63 Iowa, 82, 18 N. W. 708.

According to *Stern v. Frommer*, 10 Misc. 219, 30 N. Y. Supp. 1067, direction of a verdict for defendant at the close of plaintiff's case is improper; the most that can be done is to enter a nonsuit.

³*Proprietary v. Ralston*, 1 Dall. 18, 1 L. ed. 18.

*Not even where he has made a *prima facie* case against himself, if by evidence not conclusive against contradiction by him. *Miller v. House*, 63 Iowa, 82, 18 N. W. 708.

And especially where the evidence so far as presented discloses a question of fact, and part of the claim in suit is admitted by defendant's answer. *Hansen v. Burt*, 10 Misc. 235, 30 N. Y. Supp. 1061.

So, too, it is error to nonsuit at the close of the defendant's case without giving the plaintiff an opportunity to rebut or contradict defendant's evidence. *Metzger v. Herman*, 12 N. Y. Week. Dig. 181.

But the court may dismiss the complaint without hearing defendant's evidence, upon being satisfied, at the close of plaintiff's case in an action tried without a jury, that plaintiff cannot recover. *Neuberger v. Keim*, 134 N. Y. 35, 31 N. E. 268.

In Michigan the defendant must announce that he rests his case before he can insist that the court should rule upon a question of sufficiency of plaintiff's testimony to establish his case; until the defendant has so rested, the trial court has the right and discretion to refuse to direct the verdict in favor of defendant. *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Morley v. Liverpool & L. & G. Ins. Co.* 85 Mich. 210, 48 N. W. 502. And it is error to direct a verdict for defendant where plaintiff states, while the case is still in the hands of the defense, that he desires to offer further material testimony. *Field v. Clippert*, 78 Mich. 26, 43 N. W. 1084.

**Scofield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. N. S. 320, Affirming 10 Abb. Pr. N. S. 104. And see *ante*, Division III. *Motions on the Pleadings*, §§ 1 *et seq.*

**Reck v. Phoenix Ins. Co.* 3 N. Y. Civ. Proc. Rep. 376, 379.

5. — after strict cross-examination.

The case may be taken from the jury after plaintiff's evidence is closed, although defendant has cross-examined plaintiff's witnesses, if not going beyond strict cross-examination.¹

**Eastman v. Howard*, 30 Me. 58, 50 Am. Dec. 611 (where the qualification above stated is not expressed, but implied).

The fact that defendant had set up a counterclaim will not defeat his motion. *Slocum v. Minneapolis Miller's Asso.* 33 Minn. 438, 23 N. W. 862.

6. — after full cross-examination.

A defendant who has carried his examination of plaintiff's witnesses beyond the limits of a strict cross-examination, and brought out affirmative evidence properly part of his own case, cannot move for a nonsuit, etc., until plaintiff has had an opportunity of rebuttal.¹

**Wallingford v. Columbia & G. R. Co.* 26 S. C. 258, 2 S. E. 19. This rule necessarily results from the nature and limits of the right to nonsuit.

Otherwise, according to *Hogele v. Wilson*, 5 Wash. 160, 31 Pac. 469, where the cross-examination is only of an expert introduced by plaintiff, though matter is brought out tending to establish an affirmative defense.

7. — after final close of case.

The case may be taken from the jury on the whole evidence, including defendant's, after plaintiff's rebuttal.¹

¹*Lomer v. Mecker*, 25 N. Y. 361; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205; *Toulouse v. Pare*, 103 Cal. 251, 37 Pac. 146; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655 (nonsuit).

And the judge may do this notwithstanding he had denied defendant's motion for a nonsuit at the close of plaintiff's case. *Fitch v. Hassler*, 54 N. Y. 677.

And so, even at the close of plaintiff's case, where defendant, as a witness for plaintiff, testified fully as to the matters in controversy, and plaintiff did not ask leave to introduce rebuttal evidence. *Doyle v. Reid*, 33 App. Div. 631, 53 N. Y. Supp. 365.

In Alabama, a general affirmative charge at the close of all the evidence is properly granted only in cases where a demurrer to his adversary's evidence by the party requesting the charge could have properly been sustained. *Central R. & Bkg. Co. v. Roquemore*, 96 Ala. 236, 11 So. 475.

The cases do not clearly indicate plaintiff's right to be heard in rebuttal (if defendant has given evidence in his own behalf, beyond strict cross-examination) before he can be nonsuited on defendant's evidence with his own, but the right is clear. *Metzger v. Herman*, 12 N. Y. Week. Dig. 181. And see *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655.

But a defendant who has refused to answer or plead after his demurrer to the complaint has been overruled, is not, after the evidence on the question of damages is closed, entitled to move for a nonsuit on the merits of the case. *Howe v. People*, 7 Colo. App. 535, 44 Pac. 512.

And the legal question whether there has been a failure of proof, so that the court should order a particular verdict, must be raised before the argument and submission of the case to the jury. *Franklin v. Krum*, 171 Ill. 378, 49 N. E. 513.

8. — several codefendants.

One of several codefendants may move for a withdrawal of the case from the jury, by nonsuit or direction of verdict, or otherwise as is proper, as to himself only.¹

¹*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Hunter v. Hauptner*, 63 N. Y. S. R. 872, 30 N. Y. Supp. 1132 (dismissal of complaint).

So held even where another had defaulted; otherwise at common law. *Lomer v. Mecker*, 25 N. Y. 361, and cases cited.

Not so, however, as to one of several defendants sued jointly, where his liability is shown by the proofs to be several. *Hewitt v. Maize* (Idaho) 51 Pac. 607.

Such a motion made by all is not available to one of the defendants, as to whom a separate motion might have been entertained. *Marks v. Hastings*, 101 Ala. 165, 13 So. 297.

A motion to direct a verdict for plaintiff against all of the defendants is properly denied if plaintiff is not, as a matter of law, entitled, on the evidence, to a verdict against all the defendants. *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952.

9. — several coplaintiffs.

A nonsuit may be granted as to one of several coplaintiffs;¹ but it is error to grant it at all, for misjoinder of an unnecessary plaintiff.² So, also, a nonsuit should not be granted for defect of parties plaintiff.³

¹*Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523. Otherwise at common law.

²*Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523. Otherwise at common law. *Fuller v. Fuller*, 5 Hun, 595 (nonsuit refused though a joint action was brought on a several interest).

³As where the contract in a suit was with a copartnership and the suit was by only one of the partners. *Williams v. Southern P. R. Co.* 110 Cal. 457, 42 Pac. 974. "The absence as parties of some of the partners from a complaint by one or more of them on a partnership demand does not, speaking strictly, affect the merits, and in order to be considered must be pleaded by the defendant."

10. — variance; several causes of action.

The fact that plaintiff has proved a cause of action not alleged in his complaint does not prevent the granting of a nonsuit for an entire failure to prove the cause which was alleged,¹ unless the evidence was received without objection, and was pertinent solely to the cause of action proved.²

¹*Southwick v. First Nat. Bank*, 84 N. Y. 420; *Elmore v. Elmore*, 114 Cal. 516, 46 Pac. 458 (where a motion for a nonsuit at the close of plaintiff's evidence was held the proper method in which to raise a question of variance between the complaint and plaintiff's evidence); *Cook v. Walley*, 1 Colo. App. 163, 27 Pac. 950; *Shomo v. Ransom*, 92 Ga. 97, 18 S. E. 534; *Wisconsin C. R. Co. v. Wiczorek*, 151 Ill. 579, 38 N. E. 678 (where motion for directed verdict was overruled, and leave to amend granted, but no amendment filed; refusal to direct verdict held error); *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494.

And according to *Gallaudet v. Kellogg*, 133 N. Y. 671, 31 N. E. 337, a complaint should be dismissed, and not a verdict ordered, where there is a material variance between the complaint and proofs.

So nonsuit was held to have been properly granted, in the absence of a motion to change the narr., in *Case v. Central R. Co.* 59 N. J. L. 471, 37 Atl. 65.

Otherwise, where the facts whose omission from the complaint constitutes the variance are stated in the answer. *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. Or in the reply. *Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst*, 56 Mo. App. 427.

Or where both causes of action are alleged, though the evidence be pertinent to and sustains only one. *Levy v. Harris*, 29 App. Div. 453, 51 N. Y. Supp. 953. Especially if defendant has not moved to compel plaintiff to elect on which cause of action he will rely. *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, 64 N. W. 943.

²*New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85; *Johnson v. Spear*, 82 Mich. 453, 46 N. W. 733.

And evidence relevant and pertinent to the issues made by the pleadings is not available to support a defense not pleaded, so as to require the court to direct a verdict for defendant thereon because it is not contradicted. *Elmer v. Mutual Ben. Life Asso.* 64 Hun, 639, 19 N. Y. Supp. 289.

But a complaint is properly dismissed where evidence establishing a complete defense is admitted without objection, although such defense was not pleaded. *Drennan v. Boice*, 19 Misc. 641, 44 N. Y. Supp. 394.

11. — plaintiff's course to defeat motion.

A motion for a nonsuit, or to direct a verdict, or a demurrer to evidence, though interposed on a sufficient ground, may be defeated by the exercise of the common-law right of submitting to a voluntary nonsuit,¹ or by getting leave of the judge to withdraw a juror,² or to reopen the case and give further evidence.³

¹*Harris v. Beam*, 46 Iowa, 118; *Pleasants v. Fant*, 22 Wall. 116, 123, 22 L. ed. 780, 783; *Pescud v. Hawkins*, 71 N. C. 299; *Mayer v. Old*, 51 Mo. App. 214 (error to refuse permission to do so). Contra, if defendant has set up his answer and counterclaim for substantive relief. *Wilkins v. Suttles*, 114 N. C. 550, 19 S. E. 606.

But not by asking to discontinue when the cause is called and without giving evidence. *Duncan v. DeWitt*, 7 Hun, 184.

But if plaintiff refuses to avail himself of an offered opportunity to dismiss or take a nonsuit, he cannot complain that the court then directs a verdict for defendant. *Thompson v. Etowah Iron Co.* 91 Ga. 538, 17 S. E. 663.

In some states voluntary nonsuit is discretionary with the court. See pages 360-364 of this brief.

²*Van Syckels v. Perry*, 3 Robt. 621. This application is discretionary.

³*Hunt v. Maybee*, 7 N. Y. 266, 273; *May v. Hanson*, 5 Cal. 360; *Abbey Homestead Asso. v. Willard*, 48 Cal. 614; *Wadsworth v. Thompson*, 18 Ga. 709; *McColgan v. McKay*, 25 Ga. 631; *Larman v. Hucy*, 13 B. Mon. 436.

This application is discretionary. *Hunt v. Maybee*, 7 N. Y. 266; *Reed v. Barber*, 3 Code Rep. 160.

But a refusal to exercise discretion is error. *Lewis v. Ryder*, 13 Abb. Pr. 1.

12. Plaintiff's motion for a verdict.

Where the question, after defendant's case is closed, is in like manner entirely one of law, the judge may direct a verdict for the plaintiff.¹

¹*Anderson. County Comrs. v. Beal*, 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433, and cases cited. *People v. Cook*, 8 N. Y. 67, 75, 59 Am. Dec. 451; *Bemis v. Woodworth*, 49 Iowa, 340; and *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619,—are actions for personal injuries in which the undisputed facts showed defendant's negligence, whereupon the court so instructed the jury, leaving to them only the question of damages; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 121; *Terry v. Mutual L. Ins. Co.* 116 Ala. 242, 22 So. 532; *Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 594, 49 Pac. 714; *Pendleton v. Smissaert*, 1 Colo. App. 508, 29 Pac. 521; *Wilson Coal & Lumber Co. v. Hall & B. Woodworking Mach. Co.* 97 Ga. 330, 22 S. E. 530; *Kinscr v. Calumet Fire Clay Co.* 165 Ill. 505, 46 N. E. 372; *Hartman Steel Co. v. Hoag*, 104 Iowa, 269, 73 N. W. 611; *Hillis v. First Nat. Bank*, 54 Kan. 421, 38 Pac. 565; *Moffett v. Hampton*, 17 Ky. L. Rep. 534, 31 S. W. 881; *Woodstock v. Canton*, 91 Me. 62, 39 Atl. 218; *Farnum v. Pitcher*, 151 Mass. 470, 24 N. E. 590; *Webber v. Turner*, 94 Mich. 589, 54 N. W. 300 (error to not do so in proper case); *Western Mfg. Co. v. Rogers*, 54 Neb. 456, 74 N. W. 849; *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662 (error to refuse in proper case); *Parker v. McLean*, 134 N. Y. 255, 32 N. E. 73; *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, 64 N. W. 943; *Davis v. Huggins*, 179 Pa. 508, 36 Atl. 318; *Yankton F. Ins. Co. v. Fremont, E. & M. Valley R. Co.* 7 S. D. 428, 64 N. W. 514; *Clancy v. Reis*, 5 Wash. 371, 31 Pac. 971. See also note to *Grube v. Missouri P. R. Co.* (Mo.) 4 L. R. A. 777.

So held, notwithstanding his prior motion to direct a verdict was refused on the ground that his evidence was insufficient, where additional evidence fully justifying such direction is introduced after the first ruling. *Ward v. Dickson*, 96 Iowa, 708, 65 N. W. 997.

The motion cannot be granted before defendant's case is closed. *Kingsford v. Hood*, 105 Mass. 495. See also *Louisville & N. R. Co. v. Kirby*, 19 Ky. L. Rep. 1383, 43 S. W. 441 (sustaining refusal of peremptory instruction asked at the close of defendant's testimony, who had the burden of proof, and before plaintiff had offered any evidence).

In Missouri, it seems, a peremptory instruction to find for plaintiff is improper, even though there be no conflict in the testimony. Compare *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622; *Gregory v. Chambers*, 78 Mo. 294; *Vault v. Campbell*, 8 Mo. 224; *Bryan v. Wear*, 4 Mo. 106; *National Brewery Co. v. Lindsay*, 72 Mo. App. 591.

In North Carolina, if the plaintiff, or the party who has the burden of proof, has offered no evidence to prove the issue or no such evidence as the jury ought to find a verdict upon (as in *Wittkowsky v. Wasson*, 71 N. C. 451), the court should say so, and direct a finding in the negative. But no matter how strong and uncontradictory the evidence is in support of the issue the court cannot withdraw the issue from the jury and direct an affirmative finding. This is prohibited by the Code (§ 413). If there is

no evidence to support the negative, and the evidence, if true, establishes the affirmative, of the issue, the court may instruct the jury that if they believe the evidence they may find an affirmative. *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 107, 28 S. E. 134, and cases cited. But see *Harmon v. Hunt*, 116 N. C. 678, 21 S. E. 559 (where it was held to be the duty of the court to find for plaintiff where defendant admitted the cause of action, and offered no defense).

C. RULES OF DECISION.

13. Contents of pleading to be considered together.

Where admissions in a pleading are relied on as ground for taking the case from the jury, all the connected admissions and allegations must be taken together. It is not proper to direct a verdict if the effect of admissions is qualified by allegations on which defendant has a right to go to the jury.¹

¹*Goodyear v. De La Vergne*, 10 Hun, 537.

14. General rule as to assuming truth of adversary's evidence.

On an application to take the case from the jury, whether by motion for a nonsuit,¹ or a direction of a verdict,² or by demurrer to evidence,³ the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.

¹*Fairfax v. New York C. & H. R. R. Co.* 8 Jones & S. 123, Reversed in 67 N. Y. 11, on other grounds; *Myers v. Dixon*, 45 How. Pr. 48, 3 Jones & S. 390; *Cook v. New York C. R. Co.* 1 Abb. App. Dec. 432; *Maynes v. Atwater*, 88 Pa. 496; *Walker v. Supple*, 54 Ga. 178, 180; *Frost v. Gibson*, 59 Ga. 600, 602; *Smyth v. Craig*, 3 Watts & S. 14; *Bevan v. Insurance Co.* 9 Watts & S. 187; *Morse v. Granite County Comrs.* 19 Mont. 450, 48 Pac. 745; *Wallace v. Suburban R. Co.* 26 Or. 174, 25 L. R. A. 663, 37 Pac. 447; *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746; *Goldstone v. Merchants' Ice & Cold Storage Co.* 123 Cal. 625, 56 Pac. 776.

²*Parks v. Ross*, 11 How. 373, 13 L. ed. 735; *Purcell v. English*, 86 Ind. 34; *Pratt v. Stone*, 10 Ill. App. 633; *Bishops v. McNary*, 2 B. Mon. 132, 36 Am. Dec. 592; *Gallatin v. Bradford*, 1 Bibb, 209; s. p. *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82; *Henderson v. Chicago, B. & Q. R. Co.* 73 Ill. App. 57, and cases cited; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859; *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710; *Snell v. Consolidated Street R. Co.* 9 Ohio C. C. 348; *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* (S. D.) 47 N. W. 290; *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992.

³*Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599, and cases cited; *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. Rep. 898; *Gluck v. Cox*, 90 Ala. 331, 8 So. 161 (Code, § 2747); *Wilkinson v. Pensacola & A. R. Co.* 35 Fla. 82, 17 So.

71; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397; *Barth v. Kansas City Elev. R. Co.* 142 Mo. 535, 44 S. W. 778; *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495; *Summers v. Louisville & N. R. Co.* 96 Tenn. 459, 35 S. W. 210; *Galveston. H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Childress v. Chesapeake & O. R. Co.* 94 Va. 186, 26 S. E. 424.

15. Sufficiency of evidence.

To authorize the submission of a question of fact to the jury it is not enough that there was a mere scintilla of evidence.¹

¹*Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325, Affirming in effect, 12 Abb. Pr. N. S. 310, 5 Lans. 436, 62 Barb. 623; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489; *Mount Adams & E. P. Inclined R. Co. v. Lowry*, 43 U. S. App. 408, 74 Fed. Rep. 463, 20 C. C. A. 596; *Bygum v. Southern P. Co.* (Cal.) 36 Pac. 415; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, and cases cited; (where it is held that the phrase "evidence tending to prove" means more than a mere scintilla, but evidence upon which the jury could without acting unreasonably in the eye of the law, decide in favor of the party producing it); *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235 (expressly overruling and repudiating the scintilla doctrine); *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64; *Baltimore & O. R. Co. v. State use of Savington*, 71 Md. 590, 18 Atl. 969; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905 and cases cited; *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342; *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853; *Cable v. Southern R. Co.* 122 N. C. 892, 29 S. E. 377; *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746 (where it is held that if there be any evidence beyond a mere scintilla, however slight, from which the jury may draw an inference favorable to plaintiff, the case should go to the jury); *Galveston, H. & S. A. R. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64, and cases cited; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Marion County Comrs. v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61. In this case the court says: "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Raby v. Cell*, 85 Pa. 80 (where it is said that the rule that a scintilla of evidence must go to the jury has been justly exploded, both in England and in Pennsylvania); *Matlack v. Mann*, 37 Phila. Leg. Int. 349; *Wittkowsky v. Wasson*, 71 N. C. 451; *Nolan v. Shickle*, 3 Mo. App. 300. See also note to *People v. People's Ins. Exchange* (Ill.) 2 L. R. A. 340.

Especially where it is met, not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts about which there is no conflict. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679.

And in general it may be said that even in those jurisdictions where the doctrine that a mere scintilla of evidence must go to the jury seemed to be well established, the tendency of recent decisions has been to repudiate it and to adopt the test laid down above (paragraph 3) and now applied in nearly all jurisdictions.

As illustrations of this change in the law, see the cases above, and compare *Mercier v. Mercier*, 43 Ga. 323, 325, with *Zettler v. Atlanta*, 66 Ga. 195; and *Laing v. Americus*, 86 Ga. 756, 13 S. E. 107; and *Crookshank v. Kellogg*, 8 Blackf. 256, with *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

In Arkansas, according to *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 193, if there is any evidence whatever, however slight, pertinent to the issue, the case should not be taken from the jury, even if the court is satisfied that it would set aside a verdict found upon it, although the same judge had previously, in *Oliver v. State*, 34 Ark. 639, explained that the scintilla doctrine had never prevailed in Arkansas. But *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062, construes the phrase "any evidence, however slight," to mean that there must be more than a mere scintilla.

In a few states a scintilla of evidence is still allowed to go to the jury. There are decisions to this effect in South Carolina, Ohio, and, it seems, in Kentucky and Nebraska. *State ex rel. Jones v. Boles*, 18 S. C. 534; *Bradley v. Drayton*, 48 S. C. 214, 26 S. E. 613 (holding that on motion for nonsuit the question is whether there is *any* testimony to show facts essential to plaintiff's recovery, not whether the evidence is sufficient in that respect); *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 645, 64 Am. Dec. 610; *Dick v. Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *Smith v. Sioux City & P. R. Co.* 15 Neb. 583, 19 N. W. 638; *Wadlington v. Newport News & M. Valley R. Co.* 14 Ky. L. Rep. 559, 20 S. W. 783 (where it is said that "the rule is too well settled in this state to need the citation of authority that, if there be any evidence, however slight, to support a recovery," the case should go to the jury).

In Ohio the rule that, if plaintiff's evidence discloses a scintilla the court must ordinarily submit the issue to the jury, even though satisfied that a verdict for plaintiff would not stand, does not apply in an action to contest a will, as there is a legal presumption that the will is valid. *Bersford v. Stanley*, 6 Ohio N. P. 38.

But a total failure of evidence as to the whole case, or a total lack of evidence in support of some one essential element of the cause of action or defense renders it the duty of the court to refuse to submit the case to the jury, and to either direct a nonsuit, or to instruct the jury how to find. *Walker v. Vale Royal Mfg. Co.* 75 Ga. 29; *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624, and cases cited; *Lance v. Gorman*, 136 Pa. 200, 20 Atl. 792. Even in those jurisdictions where the scintilla of evidence doctrine is expressly recognized. *Carrier v. Dorrance*, 19 S. C. 30; *Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 646, 64 Am. Dec. 610; *Dick v. Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *Martin v. Columbia & G. R. Co.* 32 S. C. 592, 10 S. E. 960.

16. Different inferences.

It does not follow that because there is no contradictory testimony

the court must take the question from the jury and determine it as one of law. On the contrary, if different results would be reached by different minds, the question must go to the jury.¹

¹*Wait v. Agricultural Ins. Co.* 13 Hun, 371 (action on a fire policy; the question being whether the house was "unoccupied"); *Grand Trunk R. Co. v. Tennant*, 21 U. S. App. 682, 66 Fed. Rep. 922, 14 C. C. A. 190; *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; *McKune v. Santa Clara Valley Mill & Lumber Co.* 110 Cal. 480, 42 Pac. 980; *Colorado Coal & I. Co. v. John*, 5 Colo. App. 213, 38 Pac. 399; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420; *C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, and cases cited; *Neubacher v. Indianapolis Union R. Co.* 134 Ind. 25, 33 N. E. 798; *Habig v. Layne*, 38 Neb. 743, 57 N. W. 539; *New Jersey School & Church Furniture Co. v. Somerville Bd. of Edu.* 58 N. J. L. 646, 35 Atl. 397; *Anderson v. North Pacific Lumber Co.* 21 Or. 281, 28 Pac. 5.

So, if a witness is contradicted by circumstances the question should go to the jury. *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 554, 6 Am. Rep. 140; s. p. *Hackford v. New York C. & H. R. R. Co.* 53 N. Y. 654; *Smith v. Coe*, 55 N. Y. 678 (facts, not simply evidence, must be clear); *Heyne v. Blair*, 62 N. Y. 19; *Morse v. Erie R. Co.* 65 Barb. 491; *Van Ostrand v. O'Brien*, 1 N. Y. Week. Dig. 312; *Vinton v. Schwab*, 32 Vt. 612 (where the question of defendant's negligence was held to have been properly submitted to the jury, although there was no conflict in the testimony). *Lindsay v. Lindsay*, 11 Vt. 621; *Kane v. Learned*, 117 Mass. 190, 194, and cases cited; *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *Kansas P. R. Co. v. Pointer*, 14 Kan. 37, 53 (citing *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and *Detroit & M. R. Co. v. Van Steinberg*, 17 Mich. 99); *Luke v. Calhoun County*, 52 Ala. 115 (to the effect that if the jury can draw any inferences from the plaintiff's evidence, fatal to his recovery, the jury should not be instructed to find for him, even though the evidence strongly tending to support his case is uncontradicted); *Dolfinger v. Fishback*, 12 Bush, 475 (where the rule is well stated); *New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Wilson v. Pennsylvania R. Co.* 177 Pa. 503, 35 Atl. 677.

But although inferences are generally for the jury, yet where they are certain and incontrovertible the case may be decided as one of law by the court. *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326, 331; *Dolfinger v. Fishback*, 12 Bush, 475; *Anderson v. Birmingham Mineral R. Co.* 109 Ala. 128, 19 So. 519; *Kenna v. Central P. R. Co.* 101 Cal. 26, 35 Pac. 332; *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783; *Young v. Chicago, R. I. & P. R. Co.* 57 Kan. 144, 45 Pac. 583; *Baltimore & O. R. Co. v. State use of Good*, 75 Md. 526, 24 Atl. 14; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19; *Little v. Carolina C. R. Co.* 119 N. C. 771, 26 S. E. 106; *Cawley v. LaCrosse City R. Co.* 101 Wis. 145, 77 N. W. 179 (nonsuit or direction of verdict matter of right in such case).

So, too, where an inference originally an inference of fact to be drawn or not, in the opinion of the jury, becomes in the course of commercial and legal experience obvious and well known, the court are justified in treating it as a matter of law. For instances see *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605; *Hutton v. Bulloch*, L. R. 8 Q. B. 331, 334.

17. Interested testimony.

Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to the jury.¹

To constitute an interested witness within this rule it is not necessary that he should have a legal interest in the result of the litigation.²

¹*Hodge v. Buffalo*, 1 Abb. N. C. 366, 1 Buffalo Super. Ct. 418; and see *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 554, 6 Am. Rep. 140; *Gildersleeve v. Landon*, 73 N. Y. 609; *Nicholson v. Conner*, 8 Daly, 212; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Cawley v. LaCrosse City R. Co.* 101 Wis. 145, 77 N. W. 179. See also *Sheridan v. New York*, 8 Hun, 424, Reversed on other grounds in 68 N. Y. 30.

So held, although it is uncontradicted,—especially where it is improbable in many particulars. *Goldsmith v. Coverly*, 75 Hun, 48, 31 Abb. N. C. 149, 27 N. Y. Supp. 116.

Otherwise if his testimony is corroborated by that of another witness and by documentary evidence. *Anderson v. Boyer*, 156 N. Y. 93, 50 N. E. 976. And is reasonable and probable. *Hull v. Littauer*, 8 App. Div. 227, 40 N. Y. Supp. 338. Or where there is no conflict in the evidence and no circumstances from which an inference against the facts so testified to can be drawn. *Lincoln Nat. Bank v. Kirk*, 18 Misc. 45, 41 N. Y. Supp. 13.

Kavanagh v. Wilson, 70 N. Y. 177 (where the only witness to prove a contract was a son of the plaintiff who was engaged in plaintiff's business upon a salary and was to be paid a fee in case the contract drawn by him "went through;" and hence held error to take the case from the jury and direct a verdict for the plaintiff). See also case of *Wohlfahrt v. Beckert*, 12 Abb. N. C. 478, 92 N. Y. 490 (where the interest of the witness, a clerk in defendant's drug store, consisted in shielding himself and his employer from the charge of criminal negligence in omitting to label a poisonous drug which had caused the death of plaintiff's intestate); *Pratt v. Ano*, 7 App. Div. 494, 40 N. Y. Supp. 229 (where the interest of the witness resulted from his natural desire to free himself from a charge of neglect of duty); *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741 (where the witness was an attorney who had been general counselor for defendant's testator before his death, and acted as professional adviser to him in reference to the claim in suit, after the conversation to which he testifies, and who has an action pending against the executor for legal services rendered the testator).

The same principle applies where the testimony is to the whole case or to any specific fact essential to the case.

But that a witness for defendant, whose testimony is uncontradicted, is connected with a projected enterprise in connection with which the claim in suit arose, and expects to enter its employ, does not make him an interested witness, so as to require the submission of the point to the jury, where he has no pecuniary interest in the result of the suit. *Franklin Bank Note Co. v. Mackey*, 158 N. Y. 140, 52 N. E. 737.

18. Party's admission by refusal to testify.

The refusal of a party to a suit, when testifying as witness, to answer a material question on the ground that it might criminate himself, may go to the jury with other evidence against him on the point inquired of, and makes it error to withdraw that question from them.¹

¹*Andrews v. Frye*, 104 Mass. 234.

19. Direct met by circumstantial evidence.

Where the direct evidence on one side, although uncontradicted, is met by circumstantial evidence on the other, the question should be submitted to the jury.¹

¹*Babcock v. Chicago & N. W. R. Co.* 62 Iowa, 593, 17 N. W. 619; s. p. *Artisans' Bank v. Backus*, 36 N. Y. 100.

But where positive testimony is met only by belief or impressions there is no conflict of evidence (*Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 121; *Alabama G. S. R. Co. v. Rouch*, 116 Ala. 360, 23 So. 52); and a finding is not conclusive, but against evidence, which rejects the former for the latter. *Dresser v. Van Pelt*, 1 Hilt. 316.

So, also, positive testimony which is absolutely inconsistent with the admitted physical facts is unworthy of consideration and should not be submitted to the jury. *Northern C. R. Co. v. Medairy*, 86 Md. 168, 37 Atl. 796.

20. Affirmative testimony met only by negative.

Affirmative testimony met only by negative testimony as to the same occurrence does not necessarily constitute such a conflict of testimony or raise such doubts as to require the question to be submitted to the jury.¹

¹*Wickham v. Chicago & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *Culhane v. New York C. & H. R. R. Co.* 60 N. Y. 133; *McKeever v. New York C. & H. R. R. Co.* 88 N. Y. 667; s. c. more fully, 14 N. Y. Week Dig. 226; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499; *Texas Mexican R. Co. v. Baldez* (Tex.) 43 S. W. 564.

But with these cases compare *Byrne v. New York C. & H. R. R. Co.* 14 Hun, 323; *Cheney v. New York C. & H. R. R. Co.* 16 Hun, 415; *Salter v. Utica & B. River R. Co.* 59 N. Y. 631, Reversing without opinion 3 Thomp. & C. 800; *Atchison, T. & S. F. R. Co. v. Fechan*, 149 Ill. 202, 36 N. E. 1036; *Annacker v. Chicago, R. I. & P. R. Co.* 81 Iowa, 267, 47 N. W. 68; *Staal*

v. Grand Rapids & I. R. Co. 57 Mich. 239, 23 N. W. 795; *Young v. Missouri, K. & T. R. Co.* 72 Mo. App. 263; *Sayer v. King*, 21 App. Div. 624, 47 N. Y. Supp. 420; holding that negative testimony, as to the ringing of the bell of a locomotive, or showing signals, by witnesses who were giving attention or were in a position to hear the bell if rung, or see the signals if shown, and who contradict positive testimony, makes a question on conflicting evidence proper for the jury.

According to *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111, negative testimony as to the performance of certain acts, nonperformance of which is alleged as negligence, by witnesses who were giving attention and who contradict affirmative testimony in respect thereof, creates a conflict to be settled by the jury.

So, positive proof of the good order and proper management of a locomotive engine, met by negative testimony that it had set several fires as it passed, together with the evidence that an engine in good order and properly managed could not have caused the fire in question, was held, in *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615, 49 N. W. 509, to constitute a conflict to be settled by the jury. So, also, in *Tri-bette v. Illinois C. R. Co.* 71 Miss. 212, 13 So. 899; *Thomas v. New York, C. & St. L. R. Co.* 182 Pa. 538, 38 Atl. 413.

21. Positive, met only by a conclusion of law.

Positive testimony met only by testimony to a conclusion of law does not constitute a conflict of testimony requiring the case to be submitted to the jury.¹

¹*Sanborn v. Lefferts*, 16 Abb. Pr. N. S. 42, 58 N. Y. 179.

22. Uncontradicted evidence of specific fact.

Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses not appearing to be interested, it is error to submit it to the jury against objection.¹

Merely raising a question as to the credibility of a witness who is unimpeached does not take the case out of the rule.

¹*Robinson v. McManus*, 4 Lans. 380 (as qualified by the rule in *Hodge v. Buffalo*, 1 Abb. N. C. 356); *Newton v. Pope*, 1 Cow. 109, Approved in *Elwood v. Western U. Teleg. Co.* 45 N. Y. 553, 6 Am. Rep. 668; *Frace v. New York, L. E. & W. R. Co.* 143 N. Y. 182, 38 N. E. 102; *Harriman v. Queen Ins. Co.* 49 Wis. 71, 5 N. W. 12; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Scott v. Clayton*, 54 Wis. 499, 11 N. W. 595; *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900. Contra, it seems, in Pennsylvania, *Lehigh Coal & Nav. Co. v. Evans*, 176 Pa. 28, 34 Atl. 999.

So, even though the fact be established on cross-examination of an adversary's witness, upon whom the adversary relied to negative that fact. *American Exch. Nat. Bank v. New York Belting & Pkg. Co.* 148 N. Y. 698, 43 N. E. 168.

So, too, it is error to submit a question of fact to the jury when there is no

evidence in support of it, or where the evidence is all one way. *Algur v. Gardner*, 54 N. Y. 360; *Meguire v. Corwine*, 101 U. S. 108, 111, 25 L. ed. 899, 900; *Merchants Mut. Ins. Co. v. Baring*, 20 Wall. 159, 162, 22 L. ed. 250, 251; *United States v. One Still*, 5 Blatchf. 403, Fed. Cas. No. 15,954.

And where plaintiff's only witnesses were in defendant's employ and might therefore be prejudiced in defendant's favor, the question now far they were so biased is of no weight, and is not to be submitted to the jury; disbelief of their testimony cannot supply a want of proof. *Burt v. Sierra Butte Gold Min. Co.* 138 U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464.

23. Expert testimony.

The testimony of experts on a point to which other witnesses would not be competent to testify, if positive, to a matter of fact, and not mere matter of opinion on facts laid before the jury, is within the above rule; but if the question is not one which only experts are capable of determining, or their testimony is matter of opinion on facts before the jury, the question must be submitted to the jury.¹

¹I understand this to be the practical test, although the distinction is not made clear by the reported cases. Compare *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 100; *Cornish v. Farm Buildings F. Ins. Co.* 74 N. Y. 298. For example, in *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, an action for damages caused by a runaway team, alleged to have resulted from negligent driving by defendant's coachman, refusal to nonsuit the plaintiff was held error because there was, as opposed to the positive testimony of the coachman (uncontradicted and somewhat corroborated), who was shown to be a skilful driver, that all of his efforts to stop or direct the horses were futile, only the testimony of experts, who had not seen the occurrence, as to what the driver might be able to do in such an emergency as was shown to have existed.

Where the evidence of a party on an essential point consists mainly of the testimony of experts it seems that the case should go to the jury, unless the testimony leaves no reasonable doubt of the facts in issue. *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894, citing *Copp v. German American Ins. Co.* 51 Wis. 643, 8 N. W. 127, 616 (where the reason assigned is, that there are usually elements of doubt, uncertainty, and inconclusiveness in expert testimony which is for the jury to pass upon).

24. Nominal damages.

A motion for nonsuit is properly denied if plaintiff is entitled to recover even nominal damages.¹

¹*Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *Webster v. Kingsland*, 8 Bosw. 415; *Lillie v. Hoyt*, 5 Hill, 395, 40 Am. Dec. 360; *Howard v. Dayton Coal & I. Co.* 94 Ga. 416, 20 S. E. 336; *Potter v. Mellen*, 36 Minn. 122, 30 N. W. 438; *Kellogg v. Hamilton* (Miss.) 10 So. 479; *Lance v. Appgar*, 60 N. J. L. 447, 38 Atl. 695 (error to grant in such case).

25. Mode of taking case from jury.

In those jurisdictions where compulsory nonsuit or dismissal of complaint is allowed, the court should not, against plaintiff's objection, direct a verdict for the defendant instead of ordering a nonsuit, unless the ground for taking the case from the jury is such as to constitute a final bar to plaintiff's cause of action.¹

¹*Briggs v. Waldron*, 83 N. Y. 582, Affirming 9 N. Y. Week. Dig. 219.

D. VERDICT SUBJECT TO THE OPINION OF THE COURT (SPECIAL CASE).

26. When may be directed.

When the facts are indisputable, and only questions of law are raised, and no exceptions have been taken, the determination of which could affect the proofs, the judge may direct the jury to render a verdict, subject to the opinion of the court.¹

¹N. Y. Code Civ. Proc. § 1185; *Howell v. Adams*, 68 N. Y. 314, Affirming 1 Thomp. & C. 425, 13 Abb. N. C. 382, note; s. p. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494. So held in *Mathews v. Traders Bank* (Va.) 27 S. E. 609, on a demurrer to the evidence.

The effect is that in entering the verdict it is expressed to be subject to the opinion of the court; and this will prevent judgment on the verdict until the court has passed on the question of law, and leaves it in the power of the trial judge, on subsequent motion, to set aside the verdict on the ground of the insufficiency of the evidence. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494.

In this case *Mathews, J.*, says: "If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of the court. . . . Or if, in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might with propriety have reserved the question what judgment should be rendered and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon" (Judgment reversed for error in so doing). See also 13 Abb. N. C. 382, note.

Under the New York statute the judge, on motion at the same term as the trial, may order judgment on the verdict or may set aside the verdict and direct judgment for either party. N. Y. Code Civ. Proc. § 1185.

27. Contest as to facts.

A verdict may be directed, subject to the opinion of the court, when the evidence as matter of law leaves no question of fact for the jury, although counsel still controvert the facts.¹

¹*McBride v. Farmers Bank*, 26 N. Y. 450, Affirming 25 Barb. 657.

28. Questions of evidence.

Under the New York statute it is error to direct that the verdict be subject to the opinion of the court, even upon failure to object, if exceptions have been taken on questions of evidence, or if there is a conflict of evidence to go to the jury.¹

If there are any questions of fact for the jury, a verdict subject to the opinion of the court cannot be directed even if accompanied with answers by the jury to special questions determining the facts.²

¹*Purchase v. Matteson*, 25 N. Y. 211, 15 Abb. Pr. 402; *Matson v. Farm Buildings Ins. Co.* 73 N. Y. 310, 29 Am. Rep. 149, 13 Abb. N. C. 382, note.

To do so under such circumstances is a mistrial. *Flandreau v. Elsworth*, 8 Misc. 428, 23 N. Y. Supp. 671.

The question whether there is sufficient evidence to go to the jury may be reserved. *Wilde v. Trainor*, 59 Pa. 439; *Koons v. Western U. Teleg. Co.* 102 Pa. 164.

²*Gilbert v. Beach*, 16 N. Y. 606 (but *quære*).

29. Determining amount.

The verdict directed must determine the amount of recovery, if any, as well as indicate the successful party. The determining of amount cannot be reversed for a reference.¹

¹*Buchanan v. Cheseborough*, 5 Duer, 238; *Belden v. Davies*, 2 Hall, 433. But see *Bartels v. Redfield*, 16 Fed. Rep. 336, where this was done.

30. Effect of consent.

A verdict may be directed, subject to the opinion of the court, notwithstanding exceptions taken, if the parties agree as to the facts, thereby waiving all exceptions.¹

¹*Byrnes v. Cohoes*, 67 N. Y. 204, 207.

Or the exception may be expressly waived and verdict directed subject to the opinion of the court. *Cowenhoven v. Ball*, 118 N. Y. 231, 23 N. E. 470.

XX.—COUNSEL'S ADDRESS TO THE JURY.

1. Election as to cause of action.
2. The right to address the jury.
3. — third person.
4. Right to close.
5. When to be asked.
6. Number of counsel.
7. Length of argument.
8. Asking jury to take notes.
9. Right, notwithstanding conflicting evidence.
10. Evidence which was incompetent.
11. Comments on kind of evidence.
12. — on form of deposition.
13. — on objections and rulings.
14. — counter explanations.
15. Referring to the pleadings.
16. Stating what is not in evidence; aspersions.
17. Use of document not in evidence.
18. Document not formally read.
19. Misuse of evidence.
20. Nonsuited cause of action.
21. Reading medical and other scientific books.
22. Reading previous proceedings in the cause.
23. Stating or reading the law.
24. Interrupting for correction.
25. Judge may interpose.
26. Amending.

1. Election as to cause of action.

At the close of the evidence, if the pleading states the same substantial cause of action in different forms or counts and the evidence applies to both, the court may require plaintiff to elect which count he will rely on,¹ or may allow him to change an election previously made.²

¹*Roberts v. Leslie*, 14 Jones & S. 76. And see *ante*, Division III. *Motions on the Pleadings*, §§ 13-17.

²*McLennan v. McDermid*, 52 Mich. 468, 18 N. W. 222.

2. The right to address the jury.

When there is a question of fact to be submitted to the jury, a party has the right to be heard in argument to the jury within the limits hereafter stated; and an exception lies to the refusal of the right.¹

¹*Lanan v. Hibbard*, 63 Ill. App. 54; *Houck v. Gue*, 30 Neb. 113, 46 N. W. 280; *Douglass v. Hill*, 29 Kan. 527; *Cartright v. Clopton*, 25 Ga. 85 (holding it

would be error to refuse to allow anything more than "stating his points"). The *dictum* to the contrary in *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, is unsound and was so declared in *Fareira v. Smith*, 3 Misc. 255, 22 N. Y. Supp. 939.

But if he does not avail himself of the opportunity when offered it is in the discretion of the court whether afterwards to allow him to address the jury. *Herrington v. Pouley*, 26 Ill. 94.

When the court directs a verdict fixing its nature and extent it is not error to refuse to allow argument to the jury. *Harrison v. Park*, 1 J. J. Marsh. 170.

Counsel who announce that they represent defendant only for the purpose of moving for a continuance and of arguing a demurrer have no right to argue the case upon its merits to the jury at the close of plaintiff's evidence. *Gunn v. Gunn*, 95 Ga. 439, 22 S. E. 552.

3. — third person.

Amicus curiae is not entitled to be heard where the parties are attended by competent counsel; nor is counsel in another cause between other parties entitled to be heard merely because the same question arises in both.¹

¹*Nauer v. Thomas*, 13 Allen, 572, 574.

4. Right to close.

Unless otherwise regulated by statute he who holds the affirmative on the issues which are to be submitted to the jury has the right to close.¹

But if the party having such affirmative has failed to produce any evidence it is not error to give the right to close to the other party.²

In those jurisdictions in which the party having the right to close is also entitled to open the argument, a waiver by adverse counsel of his right to reply to the opening argument will cut off the right of his adversary to make any further argument.³

¹*Williams v. Allen*, 40 Ind. 295; *Davies v. Arbuckle*, 1 Dana, 525; *Page v. Carter*, 8 B. Mon. 192; *Mead v. Shea*, 92 N. Y. 122. Even though the other party gave no evidence. *Worsham v. Goar*, 4 Port. (Ala.) 441.

For a review of the statutes and decisions upon this question see *ante*, Division IV., *The Right to Open and Close*.

²*Zehner v. Kepler*, 16 Ind. 290; *Young v. Haydon*, 3 Dana, 145.

³*Tyre v. Morris*, 5 Harr. (Del.) 3; *Creager v. Blank*, 32 Ill. App. 615 (in this case the two principal arguments were waived). But see *Barden v. Briscoe*, 36 Mich. 254 (holding that there is no absolute right to produce such a result and that the matter rests in the discretion of the trial court).

It is not error to refuse to allow counsel who has consumed less than one half

of his allotted time in making his opening argument to argue further after adverse counsel announces that he does not desire to make any argument. *Southern Kansas R. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408.

5. When to be asked.

A request for a ruling on the order in which counsel shall address the jury can properly be made only after the whole evidence is in,¹ and before the arguments are heard.²

¹*Mead v. Shea*, 92 N. Y. 122, 124.

²*McKibbin v. Folds*, 38 Ga. 235, 239.

6. Number of counsel.

Only one counsel on each side is heard¹ as a matter of right,² except that where several defendants appear by separate attorneys and have separate counsel they will each be heard, unless their interests are in unison, in which case the court may require them to select one of the counsel to be heard for all.³

¹2 Tidd, Pr. 2d Am. ed. (From 8th London ed.) 909; Graham, Pr. 742; New York rule 29 of 1896.

²In the absence of express statutory regulation the number of counsel who may be heard on each side rests in the discretion of the trial court. *Carruthers v. McMurray*, 75 Iowa, 173, 39 N. W. 255.

³*Sodousky v. McGee*, 4 J. J. Marsh. 267.

7. Length of argument.

The length of time to be occupied may be limited by the court in the exercise of a sound discretion.¹ For an abuse of the discretion an exception lies.²

¹2 Tidd, Pr. 2d Am. ed. (from 8th London ed.) 909; Graham, Pr. 742; New York 304; *Foster v. Magill*, 119 Ill. 75, 8 N. E. 771; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363.

In Iowa, the court is prohibited by statute from imposing any limitation as to time. *Carruthers v. McMurray*, 75 Iowa, 173, 39 N. W. 255.

²*White v. People*, 90 Ill. 117, 32 Am. Rep. 12 (criminal case); *Senior v. Brogan*, 66 Miss. 178, 6 So. 649 (error to limit argument for the personal convenience of the presiding judge); *Zweitusch v. Lowry*, 57 Ill. App. 106.

8. Asking jury to take notes.

It is irregular to allow counsel to procure jurors to take notes of his calculations or other statements in argument, and to permit them to take out memoranda made on counsel's suggestion.¹

¹*Indianapolis & St. L. R. Co. v. Miller*, 71 Ill. 463 (reversing judgment for this and other errors). *Contra*, *Tift v. Towns*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535. The jury cannot, however, be required to do so and it will not be allowed if attended with delay or undue consumption of time.

9. Right, notwithstanding conflicting evidence.

Counsel has a right to argue to the jury upon facts as to which there is a conflict of evidence, if there be evidence to go to the jury.¹

¹*Logan v. Monroe*, 20 Me. 257.

10. Evidence which was incompetent.

Counsel has a right to argue to the jury on facts as to which evidence has been received without objection, although the evidence may have been incompetent.¹

¹*Free v. State*, 1 McMull. L. 494 (criminal case).

11. Comments on kind of evidence.

Counsel has a right to comment on the bias or interest of a witness;¹ on the fact that a person shown to be an important witness for the adverse party and within reach was not called on his behalf;² and that the adverse party failed to appear as a witness in his own behalf;³ or that he failed to put in evidence documents shown to be within his power and to contain relevant evidence.⁴

¹*Central R. Co. v. Mitchell*, 63 Ga. 173; *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53; *Morehouse v. Heath*, 99 Ind. 509.

²*Western & A. R. Co. v. Morrison*, 102 Ga. 319, 40 L. R. A. 84, 29 S. E. 104; *Gavigan v. Scott*, 51 Mich. 373, 16 N. W. 769; *Sesler v. Montgomery*, 78 Cal. 486, 3 L. R. A. 653, 19 Pac. 686, 21 Pac. 185; *Huckshold v. St. Louis, I. M. & S. R. Co.* 90 Mo. 548, 2 S. W. 794; *Gray v. Burk*, 19 Tex. 228; *Missouri P. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *McKim v. Foley*, 170 Mass. 426, 49 N. E. 625 (hand writing experts consulted as to the genuineness of a disputed signature). So the fact that a witness present and aiding in the conduct of the trial by the party in whose favor he was called was not examined to contradict the adverse party on a subject peculiarly within his knowledge, is a proper subject for comment. *Grubbs v. North Carolina Home Ins. Co.* 108 N. C. 472, 13 S. E. 236.

Where the witnesses testified on a former trial the fact that they are not shown to be important will not, standing alone, require a reversal of the judgment. *Cook v. Standard Life & Acci. Ins. Co.* 86 Mich. 554, 49 N. W. 474.

The rule does not apply where the adverse party has unsuccessfully employed the usual means to procure a witness's attendance. *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 120, 37 Pac. 341. And it is error to comment on the failure to call a witness who was equally available to both parties.

Hundley v. Chadick, 109 Ala. 575, 19 So. 845. And counsel may not refer to nor comment upon the failure of the adverse party to consent or insist that her physician disclose facts which are privileged. *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744. Nor may counsel comment upon the failure of the adverse party to call her counsel who under a rule of court could only testify by leave of court or by withdrawing from participating further in the trial of the cause. *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907.

**Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029; *Lynch v. Peabody*, 137 Mass. 92. Even where the omission was pursuant to stipulation. *Hurd v. Marple*, 10 Ill. App. 418.

**Huntsman v. Nichols*, 116 Mass. 521; *Bunce v. McMahon* (Wyo.) 42 Pac. 23. For the rule in Maine see *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

Counsel may comment upon a party's failure to produce documents in compliance with an order for their production. *Williams v. Cleveland, C. C. & St. L. R. Co.* 102 Mich. 537, 61 N. W. 52. But the refusal to produce books of account is not a proper subject for comment, where the court has properly refused to require their introduction in evidence. *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. E. 975; *Boyle v. Smithman*, 146 Pa. 255, 23 Atl. 397.

12. — on form of deposition.

The mode in which interrogatories put to a witness are framed and put is a proper subject of comment by counsel.¹

**Smiley v. Burpee*, 5 Allen, 568.

13. — on objections and rulings.

Counsel has no right to comment to the jury on the objection of the opposite party to evidence and the judge's ruling thereon.¹

**Mitchell v. Borden*, 8 Wend. 570.

14. — counter-explanations.

It is not error to allow counsel of a party, whose course in the non-production of evidence promised in his opening has been commented upon by the adverse counsel, to state the reasons for such course.¹

**Blake v. People*, 73 N. Y. 586. So a challenge to show why certain evidence was not produced will justify the court in permitting adverse counsel to explain its absence. *King v. Rea*, 13 Colo. 69, 21 Pac. 1084.

15. Referring to the pleadings.

It is not error to allow counsel to refer to or read from the pleadings for the purpose of showing the jury what are the questions in issue.¹

Tisdale v. Delaware & H. Canal Co. 116 N. Y. 416, 22 N. E. 700; *Rowe v. Comley*, 1 N. Y. City Ct. Rep. 466, 2 N. Y. Civ. Proc. Rep. 424 (saying that a party has the right in summing up to refer to the pleadings), *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698 (holding that counsel has the right to read his entire complaint). Nor need the pleading be put in evidence before it may be so used by counsel for the adverse party. *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701. Contra, *Mullen v. Union Cent. L. Ins. Co.* 182 Pa. 150, 37 Atl. 988.

But not where the pleading has been superseded by amendment and is not in evidence. *Payne v. Kings County Mfg. Co.* 2 Hun, 673. Nor where it has been withdrawn. *Riley v. Iowa Falls*, 83 Iowa, 761, 50 N. W. 33. Nor is the fact that a pleading has been amended by setting up additional or more specific defense a proper subject for comment. *Taft v. Fisk*, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621. But a party may read his pleadings and assert that he relies upon his case as pleaded, where adverse counsel has stated that he has changed his position to one that cannot be recovered upon or defended because not pleaded. *Chicago, B. & Q. R. Co. v. Levy*, 57 Ill. App. 365.

As to the right generally to read to the jury pleadings which have not been put in evidence, see *ante*, Division XIII. *The Use of the Pleadings*.

16. Stating what is not in evidence; aspersions.

If counsel states as facts matters which are not in evidence,¹ or uses language calculated to humiliate and degrade the adverse party, without foundation in the evidence, or language calculated to arouse prejudice in the jury irrelevant to the case,² the adverse party may interpose, and if the court fails or refuses to check the abuse an exception lies.

But such an abuse of the right of argument constitutes no ground for exception, where the effect of the improper remarks upon the minds of the jury has been removed by some action of court or counsel,³ and if an improper line of discussion by counsel is provoked by similar remarks⁴ or is replied to in like manner⁵ it is no just ground for complaint.

¹*Union Compress Co. v. Wolf*, 63 Ark. 174, 37 S. W. 877; *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53; *Schlotter v. State ex rel. Croy*, 127 Ind. 493, 27 N. E. 149; *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710; *Ross v. Detroit*, 96 Mich. 447, 56 N. W. 11; *Rolfe v. Rumford*, 66 Me. 564, and cases cited; *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188; *Deio v. Reid*, 52 Ohio St. 519, 40 N. E. 718 (error to permit counsel to read to the jury over objection from a deposition taken in the case but not put in evidence); *Holden v. Pennsylvania R. Co.* 169 Pa. 1, 32 Atl. 103 (error to refuse a request for the withdrawal of a juror because of improper statements by counsel not sustained by any evidence); *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Festner v. Omaha & S. W. R. Co.* 17 Neb. 280, 22 N. W. 557.

It is equally objectionable to comment upon evidence which has been ex-

cluded (*Southern R. Co. v. Shaw*, 58 U. S. App. 201, 36 Fed. Rep. 865, 31 C. C. A. 70; *Cook v. Doud*, 14 Colo. 483, 23 Pac. 906; *Miller v. Dunlap*, 22 Mo. App. 97); or to state what counsel would have been able to prove had not the adverse party objected and the court excluded the evidence. *Haynes v. Trenton*, 108 Mo. 123, 18 S. W. 1003; *Festner v. Omaha & S. W. R. Co.* 17 Neb. 280, 22 N. W. 557. But dates fixed by the record of the court may be stated to the jury as facts. *Andrews v. Graves*, 1 Dill, 108, Fed. Cas. No. 376.

²*Fry v. Bennett*, 3 Bosw. 200; *Coble v. Coble*, 79 N. C. 589, 26 Am. Rep. 338; *Cleveland, C. C. & St. L. R. Co. v. Newlin*, 74 Ill. App. 638; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196; *Magoon v. Boston & M. R. Co.* 67 Vt. 177, 31 Atl. 156.

³*Matts v. Borba* (Cal.) 37 Pac. 159; *Washington & G. R. Co. v. Patterson*, 9 App. D. C. 423; *Towner v. Thompson*, 82 Ga. 740, 9 S. E. 672; *Joliet Street R. Co. v. Caul*, 143 Ill. 177, 32 N. E. 389; *Nicks v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 27, 50 N. W. 222; *Strowger v. Sample*, 44 Kan. 298, 24 Pac. 425; *Nolan v. Johns*, 126 Mo. 159, 28 S. W. 492; *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Galveston, H. & S. A. R. Co. v. Duclin*, 86 Tex. 450, 25 S. W. 406; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475; *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213.

The consequences of an improper statement by counsel are not averted by his remark that he takes it back. *Wolffe v. Minnis*, 74 Ala. 386; *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583. And the mere formal announcement by the court that counsel's objection to improper argument is sustained is not sufficient. *Andrews v. Chicago, M. & St. P. R. Co.* 98 Wis. 348, 71 N. W. 372. The error may be so serious that no subsequent action can remove the prejudice. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *McHenry Coal Co. v. Sneddon*, 98 Ky. 684, 34 S. W. 228. The rule in New Hampshire requires a verdict to be set aside for unwarranted remarks of counsel in argument, unless the trial judge finds as a fact that the jury were not influenced thereby or that the effect upon their minds was wholly removed. *Bullard v. Boston & M. R. Co.* 64 N. H. 27, 5 Atl. 838.

Counsel's persistence in arguing outside the record after objection by opposite counsel and admonition from the court will require reversal. *Wilburn v. St. Louis, I. M. & S. R. Co.* 48 Mo. App. 224; *Rudolph v. Landwerlen*, 92 Ind. 34.

⁴*Alabama G. S. R. Co. v. Hill*, 93 Ala. 524, 9 So. 722; *Galvin v. Meridian Nat. Bank*, 129 Ind. 439, 28 N. E. 847; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875. Contra, *Tucker v. Henniker*, 41 N. H. 317, 93 Am. Dec. 425.

⁵*Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

17. Use of document not in evidence.

It is error to allow counsel to use with the jury documents that have not been put in evidence.¹

¹*Koelges v. Guardian L. Ins. Co.* 57 N. Y. 638 (reading from pamphlet proved to have been issued by defendant); *McKeever v. Weyer*, 11 N. Y. Week. Dig. 258 (exhibiting cartoon or caricature); *Union Cent. L. Ins.*

Co. v. Cheever, 36 Ohio St. 201, 38 Am. Rep. 573; *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857 (memorandum which was improperly used to refresh recollection); *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264. But counsel may use a diagram not formally in evidence in discussing the testimony of an adverse witness who used it in aid of his testimony. *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

18. Document not formally read.

It is not indispensable that a document put in evidence should have been actually read or handed to the jury before closing the evidence. But the court may allow it to be read during the argument, the adverse party being then allowed to give evidence in rebuttal or explanation, if surprised.¹

The judge has power to allow a document which proves itself to be produced on the argument, if the omission to do so before is excused, and the adverse party not prejudiced.²

¹*Harter v. Seaman*, 3 Blackf. 27; *Binder v. State*, 5 Iowa, 457; *O'Reilly v. Duffy*, 105 Mass. 243; *Carlyon v. Lannan*, 4 Nev. 156; s. p. *Clapp v. Wilson*, 5 Denio, 285 (trial before referee). Compare, as to the right to have it go to the jury in the same way, *Duke v. Cahaba Nav. Co.* 10 Ala. 82, 44 Am. Dec. 472.

²*Bank of Charleston v. Emeric*, 2 Sandf. 718.

19. Misuse of evidence.

Evidence admitted for a specific purpose counsel cannot use for a purpose for which it would have been inadmissible.¹

¹*Coleman v. People*, 55 N. Y. 81; *Dilleber v. Home L. Ins. Co.* 10 N. Y. Week. Dig. 180; *Cole v. Cole*, 5 N. Y. Week. Dig. 453; *Waldron v. Waldron*, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383 (error to use evidence in direct violation of the restriction placed by the court on its use, whether or not the evidence was admissible for all purposes).

20. Nonsuited cause of action.

If plaintiff is nonsuited as to one of several causes of action he cannot use evidence which was directly relevant only to the nonsuited cause of action, in support of the other.¹

¹*Meyer v. Cullen*, 54 N. Y. 392.

21. Reading medical and other scientific books.

It is error to allow counsel in addressing the jury to read statements from a book of inductive science,¹ unless what is so read has been received in evidence.

It is not enough that the book has been shown by expert testimony to be a standard work.²

¹*People v. Wheeler*, 9 Pac. Coast L. J. 581, 14 Rep. 111; *Yoe v. People*, 49 Ill. 410; *Washburn v. Cuddihy*, 8 Gray, 430; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, and cases cited. And see notes to *Union P. R. Co. v. Yates* (C. C. A. 8th C.) 40 L. R. A. 553, and *Ashworth v. Kirtledge* (Mass.) 59 Am. Dec. 178.

There is an exception where counsel avoids reading statements of fact and confines himself to borrowing argument which he might properly have used if it had originated with himself. *Jones v. Doe ex dem. Little Blue River Regulator Baptist Church*, Smith (Ind.) 47, Mr. Moak's article in 24 Alb. L. J. 266 (sound, though questioned in 24 Alb. L. J. 284). "Reason is neither more nor less than reason because it happens to be read from a book." Hovey, J. in *Cory v. Silcox*, 6 Ind. 39. *Legg v. Drake*, 1 Ohio St. 286, Approved in *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573.

²*Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906.

22. Reading previous proceedings in the cause.

Counsel has not a right to read to the jury or comment upon previous proceedings in the same cause¹ except that he may quote the opinion of an appellate court on a question of law only as matter of argument.²

¹*Bell v. McMaster*, 29 Hun, 272; *Griebel v. Rochester Printing Co.* 24 App. Div. 288, 48 N. Y. Supp. 505; *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666; *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583; *Good v. Mylin*, 13 Pa. 538. For the Georgia rule under statute, see *Douglass v. Boynton*, 59 Ga. 283.

Thus it is error to allow counsel to read to the jury the charge on a former trial (*Butler v. Slam*, 50 Pa. 456), or the trial judge's opinion on a former trial as to the admissibility of evidence (*Crawford v. Morris*, 5 Gratt. 90), or to allow opinion overruling demurrer to be read in which the judge indicates his opinion on a question of fact which the jury must decide. *Press Pub. Co. v. McDonald*, 26 U. S. App. 167, 63 Fed. Rep. 238, 11 C. C. A. 155, 26 L. R. A. 531. So it is error to read to the jury the record of a change of venue (*Campbell v. Maher*, 105 Ind. 383, 4 N. E. 911), or virtually to bring the record of a change of venue before the jury while contending with the court as to the propriety of its use. *Kansas City, Ft. S. & M. R. Co. v. Sokal*, 61 Ark. 130, 32 S. W. 497. Nor has counsel a right to read to the jury and comment upon the facts set forth in an affidavit for continuance made by adverse counsel at a previous term. *Louisville, N. O. & T. R. Co. v. Van Eaton* (Miss.) 14 So. 267. Contra, *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389. And it is error to permit counsel to read the opinion of the appellate court as to the weight or credibility of the evidence (*Allaire v. Allaire*, 39 N. J. L. 113), or to read the comment of the appellate court upon the facts. *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Laughlin v. Grand Rapids Street R. Co.* 80 Mich. 154, 44 N. W. 1049; *Railroad Co. v. Stewart*, 54 Ohio St. 667, 47 N. E. 1116.

It is error for counsel to state that three separate juries of the county have found a disputed question of fact in his favor. *Atwood v. Brooks* (Tex.

App.) 16 S. W. 535. But it is not error to refer to the fact that on the first trial the adverse party introduced no witnesses. *Dahlstrom v. St. Louis, I. M. & S. R. Co.* 108 Mo. 525, 18 S. W. 919.

¹*Allaire v. Allaire*, 39 N. J. L. 113, 114. ("Plainly, counsel, in his address to the jury, can, for the purpose of presenting his views of the law of his case, call to his aid and quote the language delivered from the bench." Per Beasley, Ch. J.)

In *State v. Hoyt*, 46 Conn. 333, 338, reading the whole opinion was sanctioned in a criminal case where the facts seemed necessary to understand the law, and the jury are judges of law and fact; s. p. *Noble v. M'Clintock*, 6 Watts & S. 58, explained in *Good v. Mylin*, 13 Pa. 538.

23. Stating or reading the law.

Counsel has the right to state his views of the law to the jury by way of argument of the questions of fact to be submitted to them, except that he is not entitled to argue against any ruling already made upon the trial, and provided that it be understood that the jury are to take the law from the instructions of the judge, and not from counsel.¹

Allowing counsel against objection to go beyond this limit in reading from law books is error.²

¹*Ransone v. Christian*, 56 Ga. 351; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Kean v. Detroit Copper & Brass Rolling Mills*, 66 Mich. 277, 33 N. W. 395. Contra, *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655. But it is error to allow counsel's incorrect statement of the method of arriving at the measure of damages to go to the jury. *Alabama G. S. R. Co. v. Carroll*, 52 U. S. App. 442, 84 Fed. Rep. 772, 28 C. C. A. 207; *Storrie v. Marshall* (Tex. Civ. App.) 27 S. W. 224. And permitting counsel to instruct the jury as to the impropriety of a quotient verdict is objectionable, though not reversible error, since they are not thereby directed how they shall find their verdict. *Missouri, K. & T. R. Co. v. Steinberger*, 6 Kan. App. 585, 51 Pac. 623.

In California it is discretionary with the trial court to permit counsel to read and comment upon the instructions previously settled by the court. *Borcham v. Byrne*, 83 Cal. 23, 23 Pac. 212. But under a statute giving a party the right to read to the jury, as the law in the case, instructions submitted by him to the court and marked by it "given," counsel cannot construe such instructions in argument. *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666. Nor should counsel comment upon the law wholly outside of the instructions of the court, though such comment will not require a reversal, where the facts of the case clearly warrant such an instruction if asked. *Dean v. Chandler*, 44 Mo. App. 338.

²In some jurisdictions it seems to be the right of counsel to read to the jury from books of law for the purpose of aiding him in presenting his views of the law. *Reg. v. Courvoisier*, 9 Carr. & P. 362; *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251; and see *Allaire v. Allaire*, 39 N. J. L. 113. In other states the practice is not permitted (*Baldwin's Appeal*, 44 Conn. 37; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82; *Hudson v.*

Hudson, 90 Ga. 581, 16 S. E. 349; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Porter v. Choen*, 60 Ind. 338; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129),—especially where the decision proposed to be read is entirely irrelevant (*Mullen v. Reinig*, 72 Wis. 388, 39 N. W. 861), nor does the fact that a decision is sought to be read only by way of illustration render the practice proper. *Chicago v. McGiven*, 78 Ill. 347. In still other jurisdictions the matter rests in the discretion of the trial court. *Gregory v. Ohio River R. Co.* 37 W. Va. 606, 16 S. E. 819; *Williams v. Brooklyn Elev. R. Co.* 126 N. Y. 96, 26 N. E. 1048; *Lyon v. Jones*, 86 Tex. 492, 25 S. W. 694; *Gilberson v. Miller Min. & Smelting Co.* 4 Utah, 46, 5 Pac. 699; *State v. Klinger*, 46 Mo. 224. But the practice is not to be commended. *Steffenson v. Chicago, M. & St. P. R. Co.* 48 Minn. 285, 51 N. W. 610. And it is error to permit such a course where the matter proposed to be read is calculated to have the effect of evidence. *Galveston, H. & S. A. R. Co. v. Wesch*, 85 Tex. 593, 22 S. W. 957; *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. 801. And it is error to permit counsel to read irrelevant decisions of a foreign court without instructing the jury as to the purposes for which they are introduced and without informing them that it is their duty to look to the court for the law so far as applicable to the case. *Slaughter v. Metropolitan Street R. Co.* 116 Mo. 269, 23 S. W. 760.

See also upon this question note to *Union P. R. Co. v. Yates* (C. C. A. 8th C.) 40 L. R. A. 553.

24. Interrupting for correction.

Counsel has a right to interpose, during the argument of adverse counsel, to object to his misstating the evidence or transcending the limits of argument.¹

¹*Long v. State*, 12 Ga. 293, 330; *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439 (holding it error for counsel to ask the jury either directly or by implication to consider such an objection as evidence against the party making it on the merits of his case).

But not to his assuming as proved that as to which there is a conflict of testimony. *Hatcher v. State*, 18 Ga. 460 (criminal case).

25. Judge may interpose.

It is proper for the court, of its own motion, to interpose in restraint of counsel transgressing these rules.¹

¹*Melvin v. Easley*, 46 N. C. (1 Jones L.) 386, 62 Am. Dec. 171; *Tucker v. Henniker*, 41 N. H. 317, 323; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566, 577 and cases cited; *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *Amperse v. Fleckenstein*, 67 Mich. 247, 34 N. W. 564; *Frank v. Humphreys*, 24 S. C. 325.

A request by counsel to read irrelevant matter in his argument to the jury should be denied by the court on its own motion, instead of asking opposing counsel if they are willing to consent thereto, thus forcing them to make objection. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53.

And where the court has of its own motion checked counsel in the course of an improper argument, it is error to fail to stop counsel for the adverse party from arguing on the same matter, even if no objection be interposed. *Jenkins v. Hankins*, 98 Tenn. 545, 41 S. W. 1028.

26. Amending.

Under a statute permitting pleadings to be amended "on" the trial, an amendment may be allowed during the argument. On the trial means before the close of it.¹

¹*Franklin F. Ins. Co. v. Findlay*, 6 Whart. 483, 39 Am. Dec. 430.

XXI.—THE INSTRUCTIONS.

[The statutes existing in many of the states, restraining the judge's instructions, are so diverse and so diversely construed, and so well understood each in their own locality, that I have not thought it best to take the necessary space to state them; and I have been confirmed in this by the impression that they chiefly are due to causes that may not be generally permanent, and will be likely to give way in course of time.

In respect to "special verdicts" and "special questions," the reader will find much confusion in the language of the reports, answers to special questions being often called special verdicts. As the two proceedings are entirely distinct (although putting special questions is a convenient substitute for asking a special verdict), it may be useful here to make clear my use of these expressions. A special verdict, properly so-called, is a finding of facts, with conclusion in the alternative, that if upon these facts the law is for plaintiff, the jury find for plaintiff, if upon these facts it is for defendant, the jury find for defendant. The jury have, in certain cases, a right to find thus specially on all or any of the issues, and this enables them sometimes to agree in appearance and be discharged, while, in reality, disagreeing, those in favor of an absolute verdict one way being content to accompany it with a special verdict which those opposed to the general verdict think will vindicate their view.

The putting of special questions is an analogous mode of requiring the jury to find on any facts in issue; and though it may have a similar effect it has great advantage in defining the pivotal facts so as to enable the court to apply the law with more justice than a general verdict would.

The finding of the jury in either case is, in a general sense, a "special" verdict; but it is more convenient, for clearness in stating the rules here, to confine the term "special verdict" to what was known

as such at common law; and to designate answers given under the more modern method of putting questions, as "special findings."]

A. GENERAL RULES.

1. Power of court; necessity of request.
2. State statutes in United States courts.
3. Right of request.
4. Requiring written request; time; signature, etc.
5. Right of counsel to see.
6. Ruling on request; in general.
7. — complex request.
8. — modifying, limiting, and qualifying requests.
9. — marking instructions "given" or "refused."
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11. Requiring the charge to be in writing.
12. — statutes.
13. — what must be in writing.
14. — charge taken down by stenographer.
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16. — oral explanations, modifications, additions, etc.
17. — numbering paragraphs of the charge.
18. — signing the charge.
19. Form and style generally.
20. Clearness, definiteness, and certainty.
21. Argumentativeness.
22. Consistency and harmony.
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B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

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25. Referring to pleadings.
26. Separate defenses.
27. Superfluous allegation.
28. Limiting to issues and evidence.
29. Conforming to facts in evidence.
30. Burden of proof.
31. Presumption of law.
32. Presumption of fact.

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| | 82. Power of the court. |

A. GENERAL RULES.

1. Power of court; necessity of request.

In the absence of a statute to the contrary the judge has power to instruct the jury *sua sponte*;¹ but it is usually held to be in his discretion whether to do so or not, if neither party request it.²

¹*Thistle v. Frostburg Coal Co.* 10 Md. 129; *Stumps v. Kelley*, 22 Ill. 140; *York v. Maine C. R. Co.* 84 Me. 117, 18 L. R. A. 60, 24 Atl. 790; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

In Mississippi, a statute forbids the judge to charge except upon request. *Archer v. Sinclair*, 49 Miss. 343.

In Iowa, a justice of the peace has no power to charge the jury in a case on trial before him. *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa, 380, 5 N. W. 568.

In Alabama, a charge by the court of its own motion upon the effect of the evidence is expressly forbidden by statute. (Code 1896, § 3326); *Mayer v. Thompson-Hutchison Bldg. Co.* 116 Ala. 634, 22 So. 859. Even though the credibility of the evidence be submitted to the jury. *Parker v. Daughtry*, 111 Ala. 529, 20 So. 362.

²This is the undoubted rule of practice as to submitting to the jury a particular point, or particularizing or making more definite the points submitted; the courts agreeing with practical unanimity that partial non-direction, or omission to charge as to a particular issue, or mere generalization, indefiniteness, ambiguousness and the like, constitute no reversible error in the absence of a specific request for more specific and comprehensive instructions. *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed. 327, affirming 4 Wash. C. C. 538, Fed. Cas. No. 10, 941; *Williams v. Simons*, 36 U. S. App. 16, 70 Fed. Rep. 40, 16 C. C. A. 628, and cases cited; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445 and cases cited; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733; *Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181; *Nichol v. Laumeister*, 102 Cal. 658, 36 Pac. 925; *Highlands v. Raine*, 23 Colo. 295, 47 Pac. 283; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; *Lungren v. Brownlie*, 22 Fla. 491; *Norman v. Georgia Loan & T. Co.* 92 Ga. 295, 18 S. E. 27; *Chicago & A. R. Co. v. Esten*, 78 Ill. App. 326, Affirmed in 178 Ill. 192, 52 N. E. 954; *Baltimore & O. S. W. R. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588; *Reamer v. Columbia*, 5 Kan. App. 543, 47 Pac. 186; *Turner v. King*, 98 Ky. 253, 260, 32 S. W. 941, 38 S. W. 405 (where it was said: "In a criminal case it is the

duty of the court to give the whole law of the case, but in a civil action the court is not required, unless called on to do so, to give instructions embracing every theory of the plaintiff's cause of action that is or may be supported by the testimony, or that of the defense, and if the instructions given are otherwise objectionable, the fact the court has omitted to give to the jury every instruction authorized affords no ground for a reversal"); *Carter v. Augusta*, 84 Me. 418, 24 Atl. 892; *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *Barth v. Kansas City Elev. R. Co.* 142 Mo. 535, 44 S. W. 778 (where it was said that "In civil cases it is not the duty of the trial court to instruct of its own motion if the parties neglect to ask proper instructions"); *Kelley v. Cable Co.* 7 Mont. 70, 14 Pac. 633; *Weber v. Whetstone*, 53 Neb. 371, 73 N. W. 695; *Allison v. Hagan*, 12 Nev. 38; *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317; *Haupt v. Pohlmann*, 16 Abb. Pr. 301, 307, 1 Robt. 121; *Quinby v. Carhart*, 133 N. Y. 579, 30 N. E. 972; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385, 20 N. E. 466; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 111; *Johnson v. Hibbard*, 29 Or. 184, 41 Atl. 327, and cases cited; *Strother v. South Carolina & G. R. Co.* 47 S. C. 375, 25 S. E. 272; *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201; *Maxwell v. Hill*, 89 Penn. 584, 15 S. W. 253, and cases cited; *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *Bow v. Kelso*, 5 Wash. 360, 31 Pac. 973; *Liegel v. Aitken*, 94 Wis. 432, 35 L. R. A. 249, 69 N. W. 67; *Bunce v. McMahon* (Wyo.) 42 Pac. 23.

So, also, in some states, as to submitting the case to the jury without any charge whatever. *Berry v. Texas & N. O. R. Co.* 72 Tex. 620, 10 S. W. 726; *Taft v. Wildman*, 15 Ohio, 125. See also *Stuckey v. Fritsche*, 77 Wis. 329, 46 N. W. 59, where it was held that a statute requiring instructions when given on request to be given in writing, unless the giving of them in writing is waived by the parties, does not require the judge to charge the jury in every case, whether requested to do so or not, but was enacted only for the purpose of requiring written instructions when requested. In this case the judge submitted the case to the jury without any charge whatever, and, as no request for a charge was made, there was held to be no ground for complaint.

So, that an instruction was oral instead of in writing, as required by law, was no ground for reversal when no definite request was made for written charge, and the verdict included nothing that the prevailing party was not entitled to, see *Perkins v. Marrs*, 15 Colo. 262, 25 Pac. 168.

On the other hand, there are cases which hold it to be the duty of the judge to present to the jury the substantial issues in the cause and state to them the principles of law governing the rights of the parties, irrespective of whether any specific instructions are requested by counsel or not. *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Central R. Co. v. Harris*, 76 Ga. 502; *Upton v. Paxton*, 72 Iowa, 299, 33 N. W. 773; *Donahue v. Windsor County Mut. F. Ins. Co.* 56 Vt. 379. So, also, by statute in North Carolina (Code, § 395); *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45.

That a general request that the judge shall so charge can add no force whatever to the judge's obligation in this respect, see *Hanover F. Ins.*

Co. v. Stoddard, 52 Neb. 745, 73 N. W. 291. And where the judge has failed of his duty in this respect, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded. *York Park Bldg. Asso. v. Barnes*, 39 Neb. 834, 58 N. W. 440.

2. State statutes in United States courts.

State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which he will permit to go to them in their retirement, or the requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the courts of the United States.¹

¹*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *United States v. Train*, 12 Fed. Rep. 852.

For these regulations the local statutes should be consulted. In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except. *Smith v. Crichton*, 33 Md. 103, 108.

3. Right of request.

A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and to have the instruction of the court given to the jury thereon; and it is error to refuse to listen to a timely request so to do.¹

¹*Chapman v. McCormick*, 86 N. Y. 479; *Missouri, K. & T. R. Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90.

The right of counsel to present requests to charge was considered in *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 29 N. E. 84, and the rule stated above was reiterated, but was held to be inapplicable to that particular case.

And it is error to refuse a requested instruction because not included among the written requests presented to the judge before his charge, in accordance with a direction to that effect, where it is upon a material point which the appellant might reasonably anticipate would be covered by the charge. *Gallagher v. McMullin*, 7 App. Div. 321, 40 N. Y. Supp. 222.

4. Requiring written request; signature, etc.

The courts generally have power, either by statute, rule of court, or under the practice settled by adjudicated cases, to require that instructions asked for be presented before argument made to the jury,¹ or before the general charge to the jury,² and in writing;³ and, in some states, there are statutes requiring them to be numbered⁴ and signed by the parties asking them, or their counsel.⁵

But, notwithstanding such a limit of time, counsel acting in good faith has a right, after the judge has instructed the jury and before they have retired, to request him to correct an error or supply a deficiency.⁶

¹*Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 678, 21 L. ed. 698, 700; *Chicago v. Fitzgerald*, 75 Ill. App. 174; *Craig v. Frazier*, 127 Ind. 280, 26 N. E. 842; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; *Ela v. Cockshott*, 119 Mass. 416, 418; *Ward v. Albermarle & R. R. Co.* 112 N. C. 168, 16 S. E. 921 (where it is held that requests must be presented at or before the close of the evidence, notwithstanding silence of the Code (§ 415) in relation thereto. See also cases there cited); *Caldwell v. Brown*, 9 Ohio C. C. 691; *Batdorf v. Fehler* (Pa.) 9 Atl. 468. According to *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328, it is discretionary with the judge whether he will consider or ignore requests handed to him out of time, and that he grants or refuses a request after argument begun affords no ground for complaint to the other side. But according to *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, it is improper to refuse an instruction asked, on the ground that it was not presented in time, in the absence of any rule of court in writing and of record, limiting the time within which instructions shall be presented. The opinion is silent, however, as to when the request was, in fact, submitted. See also *Heligmann v. Rose* (Tex.) 13 L. R. A. 272, note, for cases on when requests are properly submitted.

And giving an instruction in response to a question by a juror after the other instructions had been given is not a violation of a rule of court that instructions will not be examined unless presented before the commencement of the final argument, except where the rule will work injustice, the question of the juror presenting, in fact, such an exception as was contemplated by the rule. *Arnold v. Phillips*, 59 Ill. App. 213.

A request of counsel for defendant, while plaintiff was making his closing speech, that the court instruct the jury upon the law of the case, was held premature and properly refused, in *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

In Ohio, not only must the request be made before argument, but, if requested, the instruction must be given before argument. *Monroeville v. Root*, 54 Ohio St. 523, 44 N. E. 237. But it is not error for the court in its final charge to give charges submitted with request that they be made part of the charge, but without request that they be given before argument of counsel. *Toledo v. Higgins*, 12 Ohio C. C. 646.

Thus, in Utah, an instruction not presented to the court before the charge to the jury is given is properly refused. Comp. Laws, § 3362; *Flint v. Nelson*, 10 Utah, 261, 37 Pac. 479.

But, in Tennessee, counsel should first hear the general charge and then make such requests as in their opinion are right and proper in extension or modification. And requests for special or additional instructions made before any charge has been given, none of which are requested afterward, are properly refused. *Railway Cos. v. Hendricks*, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488. So, too, where they are submitted at

the conclusion of the evidence and no request for additional instructions is made after the general charge. *Chesapeake O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428. It is usual, however, for counsel by oral argument or written statement, sometimes both, to present their views of the law of the case in advance of the general charge. That is a proper practice, and instead of being condemned, it is to be encouraged; yet such presentation is not to be treated as a request for an additional instruction, and made ground for reversal if not adopted by the trial judge.

*N. C. Code, § 415; Kan. Gen. Stat. 1897, chap. 95, § 285; *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698; *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600, 5 So. 353; *Chicago v. Fitzgerald*, 75 Ill. App. 174; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456; *Caldwell v. Brown*, 9 Ohio C. C. 691.

And a statutory requirement that the request be in writing applies to a requested instruction for a direction of a verdict. *Swift & Co. v. Fue*, 167 Ill. 443, 47 N. E. 761.

Good practice requires that counsel desiring to request instructions should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge.

If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read; or he may, in his discretion, require them to be first submitted to the adverse counsel, and then charge those that are consented to and determine whether or not to charge those that are not consented to.

The court is not bound to comply with an oral request to modify a written charge where, upon reading it to the jury in its exact language, the counsel presenting it states that if he so requested in writing it was a clerical error, and proceeds to state the alleged error, and the court for the purpose of understanding it requests him to reduce the modification to writing, and he fails to do so. *Savannah, T. & I. of H. R. Co. v. Beasley*, 94 Ga. 142, 21 S. E. 285.

*For example, see Kan. Gen. Stat. 1897, chap. 95, § 285; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588.

*For instance, see N. C. Code, § 415; Kan. Gen. Stat. 1897, chap. 95, § 285; *Craig v. Frazier*, 127 Ind. 286, 26 N. E. 842; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588.

And that an unsigned request may properly be refused, see *Texas & P. R. Co. v. Mitchell* (Tex. Civ. App.) 26 S. W. 154.

But where a request is adopted and made the charge of the court by the judge's marking it "given" and signing it officially, the objection that it was not signed by counsel asking it is without merit. *Galveston, H. & S. A. R. Co. v. Neel* (Tex. Civ. App.) 26 S. W. 788.

The object in requiring prayers for instructions to be numbered and signed is not for the information or guidance of the jury, but for the convenience of the court and the protection of the parties litigant in the matter of preserving their objections and exceptions. If a party omits this requirement, or suffers the opposing party to do so without objecting in

apt time, he will not be heard afterwards to complain of the omission. The trial court is not bound to entertain an objection that instructions are not numbered and signed when the same is presented for the first time on a motion for a new trial; nor will the appellate court consider such an objection on appeal or writ of error, unless it appears that timely objection was made in the court below. *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348, and cases cited.

⁴*Crippen v. Hope*, 38 Mich. 344; *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36; s. p. *Chapman v. McCormick*, 86 N. Y. 479. See also *Further Instructions*, *infra*, § 65.

And it is error to refuse a proper request, although not in writing, to qualify the charge given, where such qualification would relieve the charge of error, and without it the charge does not fully and accurately present the law. *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105.

And a necessary and proper instruction, requested after an argument on each side has been made to the jury, is improperly refused where it was overlooked by counsel before the argument, unless the opposite side will be unduly prejudiced by giving it. *Wills v. Tanner*, 13 Ky. L. Rep. 741, 18 S. W. 166.

And a rule of court requiring requests to charge to be made before the general charge, was held in *Bradley v. Drayton*, 48 S. C. 234, 26 S. E. 613. not to forbid a judge from stating a correct legal proposition upon a point which had either been overlooked or insufficiently stated to the jury in the general charge, although the request therefor was not made until after the general charge.

So, a statute empowering the judge to instruct the jury at the conclusion of the evidence and before arguments of counsel does not forbid an instruction to disregard an assertion by counsel in argument as to which there is no evidence, after the argument has been commenced, or even after the jury have retired. *Bogges v. Metropolitan Street R. Co.* 118 Mo. 328, 23 S. W. 159, 24 S. W. 210.

5. Right of counsel to see.

Counsel has a right to see or hear the requests to charge which are presented by his adversary.¹

¹This right is essential to secure a fair trial, both because no communication in the course of the trial should be received by the judge from either side in exclusion of the other, and because the omission to comply with a proper request of the adversary is not unfrequently fatal to a just and otherwise regular verdict. The right stated in the text is recognized by *Tinkham v. Thomas*, 2 Jones & S. 237.

But an Indiana statute, requiring the parties desiring special instructions to reduce them to writing numbered and signed, and deliver them to the court before the argument commences, was held, in *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 367, 34 N. E. 100, not to have been designed for the purpose of affording opposing counsel opportunity to examine the instructions asked before the argument commences, but was merely to afford the court an opportunity to examine them before giving, modifying, or refusing them. If it is desired to know in advance of the argu-

ment what instructions the court proposes to give, either of its own motion or the motion of opposing counsel, counsel must proceed under the provisions of another statute, and request the court to indicate what instructions are to be given.

6. Ruling on requests; in general.

The court may reject a requested instruction which is not correct as an entirety,¹ even though modification or explanation would remove the defects and make it applicable to the case.²

And it is proper to reject a requested instruction which proceeds upon a view of the law, and presents questions entirely different from and inconsistent with those embraced in correct instructions given.³

So, too, as a general rule, the court is not obliged to give instructions in the language precisely as framed and submitted, however correct they may be, but may, in lieu thereof, give instructions prepared by himself covering, as he views the case, all the questions of law presented upon which it is necessary and advisable to instruct the jury,⁴ unless it is otherwise expressly provided by statute.⁵

But it is error for the court to reject instructions sound in law and applicable to the evidence,⁶ unless, in lieu thereof, other correct instructions so prepared by the court are given⁷ or the principles urged are substantially embodied in the court's charge already given.⁸

¹*Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464; *Atlanta v. Buchanan*, 76 Ga. 585; *McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455; *Dickson v. Randal*, 19 Kan. 212; *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587; *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 270 (where it is held that if the party is not entitled to the instruction in the very form in which it is requested, it is not error to refuse it); *Burnham v. Logan*, 88 Tex. 1, 29 S. W. 1067; *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263; *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372. According to *Marlborough v. Sisson*, 23 Conn. 55, however, the court may grant the request so far as it is correct.

Under the system of practice prevailing in Missouri, it is only when, by statutory enactment, instructions are required to be given, that it is error to refuse to do so, however correctly they may present the law and however much they may be authorized by the evidence. *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478.

²*Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562; *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 147; *Dempsey v. Reinsedler*, 22 Mo. App. 43; *Bishop v. Goodhart*, 135 Pa. 374, 19 Atl. 1026; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494. Contra, *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749; *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12, where it is held that such an instruction should not be refused, but should be given with such explanation of its

meaning as will insure its being understood by the jury in the proper sense, unless the instruction is inherently defective.

Waggaman v. Nutt, 88 Md. 265, 41 Atl. 154.

Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801; *O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171; *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309; *Chicago v. Moore*, 139 Ill. 201, 28 N. E. 1071; *Conlon v. Oregon Short Line R. Co.* 23 Or. 499, 32 Pac. 397; *Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 982; *Dorey v. Metropolitan L. Ins. Co.* 172 Mass. 234, 51 N. E. 974; *Naples v. Raymond*, 72 Me. 213; *Chandler v. DeGraff*, 25 Minn. 88; *Lewis v. Rice*, 61 Mich. 97, 27 N. W. 867; *Archer v. Sinclair*, 49 Miss. 343; *Lau v. W. B. Grimes Dry Goods Co.* 38 Neb. 215, 56 N. W. 954; *Rublee v. Belmont*, 62 N. H. 365; *Fath v. Thompson*, 58 N. J. L. 188, 33 Atl. 391; *Morehouse v. Yeager*, 71 N. Y. 594; *Leaving v. Smith*, 115 N. C. 385, 20 S. E. 446; *Long v. Reid*, 4 Pa. Dist. R. 71; *Wade v. Columbia Electric Street R., Light & P. Co.* 51 S. C. 296, 29 S. E. 233; *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481; *Reed v. Newcomb*, 64 Vt. 49, 23 Atl. 589. Contra, *Gottstein v. Seattle Lumber & Commercial Co.* 7 Wash. 424, 35 Pac. 133; *Trezevant v. Rains* (Tex. Civ. App.) 25 S. W. 1092; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266; *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 27 S. E. 20 (citing 4 Minor, 3d ed. §§ 1084, 1085).

Indeed, the preparation of a charge by the judge may often have the advantage of furnishing the jury with a terse, consecutive, and logical statement of the law applicable to the case, in place of the loose, disjointed, and obscure presentation of the law which often results from giving instructions in the form in which they are prepared and submitted by counsel.

If the court do this, it should embody in the charge, and in some sufficient form specifically, and not by vague generalities so prepared, either literally or in substance, all proper instructions asked by counsel. *District of Columbia v. Gray*, 1 App. D. C. 500; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804. And so prepare his charge as to avoid all inconsistencies, and not necessitate the indulgence of the presumption that the jury were able to reconcile the apparent inconsistencies or penetrate the obscurities of the charge. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801.

But refusal to give a request to charge, which is legal and adjusted to a distinct matter in issue affecting the result of the suit, is ground for a new trial, according to *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110, where the case is a close one under the evidence, and the issue as to which the instruction was asked was a most vital one, although in principle, and in general and more abstract terms, the requested instruction may be covered by other instructions given by the court.

And if for want of time the judge is not able to prepare and give, in his general charge, that clear and succinct statement of the law most desirable for the consideration of the jury, requests to charge which state the law correctly, and in such clear, terse, and comprehensive manner as to be most easily understood by the jury, should be given in the language in

which they are presented. *Cook v. Brown*, 62 Mich. 473, 29 N. W. 46.

*Thus, in South Dakota, a statute requires that all instructions asked for shall be given or refused without modification or change, unless the modification or change be consented to by counsel; and to read an instruction, as an instruction requested by one of the parties, in language substantially different from that requested, is a direct violation of that statute. But it seems that if the judge has any doubt as to the propriety of a request he may mark it "refused" and cover the same ground by an instruction of his own. *Pearl v. Chicago, M. & St. P. R. Co.* 8 S. D. 431, 66 N. W. 814, 8 S. D. 634, 67 N. W. 837. Whether the judge may not refuse a request which correctly declares the law if, in its own charge, the same point is covered by a proper instruction (see *Informing Jury as to Effect of Verdict,—on Costs,—on Imprisonment, infra*, § 64), or whether it may not modify a request and give such modified instructions as its own (see note 1 to § 8, *infra*) are different questions.

And, in Wisconsin, a statute requires the court to give instructions asked, "without change or modification, the same as asked, or refuse each in full;" but this does not forbid a change or modification necessary to conform the instruction to the law. *Eldred v. Oconto Co.* 33 Wis. 134. Otherwise, however, if the change or modification should affect injuriously the right of the party asking the instruction.

So, in Alabama, a statute requires that charges moved for by either party in writing must be given or refused in the terms in which they are written. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238.

*Thus, in South Carolina, the Constitution requires the circuit judge to "declare the law;" and this is held to mean that he shall declare the law applicable to the case before him. And to refuse requests which, taken in connection with the facts as shown by the evidence, embody that law, is a fatal dereliction of that duty. *Wagener v. Parrott*, 51 S. C. 489, 29 S. E. 240.

A requested instruction which supplies an omission of the general charge, as to a material point, is improperly rejected. *Burnham v. Logan*, 88 Tex. 1, 29 S. W. 1067.

*See notes 4 and 5, *supra*.

**Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372. See also *Informing Jury as to Effect of Verdict,—on Costs,—on Imprisonment, infra*, § 64.

7. Complex request.

When instructions are asked in the aggregate, or a series of propositions are presented as one request, the whole may properly be rejected by the court if there is anything exceptionable in either of them,¹ or if either of them as presented requires any modification or amendment.²

¹*Mann Boudoir Car Co. v. Dupre*, 21 L. R. A. 289, 54 Fed. Rep. 646; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, and cases cited; *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464; *Birmingham v. Pettit*, 21 D. C. 209; *Baker v.*

Chatfield, 23 Fla. 540, 2 So. 822; *Wilcox v. Mims*, 95 Ga. 564, 20 S. E. 382; *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672, Affirming 40 Ill. App. 590; *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 So. 856; *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587; *Kelly v. State*, 51 Neb. 572, 71 N. W. 299; *Consolidated Traction Co. v. Chenowith*, 58 N. J. L. 416, 34 Atl. 817, Affirmed in 35 Atl. 1067; *Caldwell v. Murphy*, 11 N. Y. 416; *McGee v. Wells*, 52 S. C. 472, 30 S. E. 602; *United States v. Musser*, 4 Utah, 153, 7 Pac. 389; *Good v. Knox*, 64 Vt. 97, 23 Atl. 520; *Croft v. Northwestern S. S. Co.* 20 Wash. 175, 55 Pac. 42.

¹*Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756.

8. — modifying, limiting, and qualifying requests.

The court have power to modify, limit, or qualify a request to charge, so as to obviate objections raised and conform the instruction to their own view of the law;¹ but it cannot be demanded, as matter of right, that the court do this,² for the court may, if it is considered desirable, reject the request altogether.³

Nor is the court required to strike from a requested instruction the part which renders it defective, and charge the remainder.⁴

¹*Van Gunden v. Virginia Coal & I. Co.* 8 U. S. App. 229, 52 Fed. Rep. 838, 3 C. C. A. 294; *Evans v. Givens*, 22 Fla. 476; *Libby, McN. & L. v. Scherman*, 146 Ill. 540, 34 N. E. 801; *Sherfey v. Evansville & T. H. R. Co.* 121 Ind. 427, 23 N. E. 273; *Moore v. Chicago, B. & Q. R. Co.* 65 Iowa, 505, 22 N. W. 650; *Evans v. Lafeyth*, 29 Kan. 736; *Schulz v. Schulz*, 113 Mich. 502, 71 N. W. 854; *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 342; *Archer v. Sinclair*, 49 Miss. 343; *Boggess v. Metropolitan Street R. Co.* 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; *Ballard v. Chicago, R. I. & P. R. Co.* 51 Mo. App. 453; *Horne v. People's Bank*, 108 N. C. 109, 12 S. E. 840; *Alexander v. Richmond & D. R. Co.* 112 N. C. 720, 16 S. E. 896; *Yardley v. Cuthbertson*, 108 Pa. 395, 1 Atl. 765; *Knobeloch v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962 (where it is held that modifying an erroneous request, and thus freeing it of some of its faults, without other change, is not ground for reversal at the instance of the one preferring the request, even though, as modified, it is not entirely correct); *Missouri P. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835; *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127. Otherwise by statute in Alabama. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238 (holding that a statute providing that "charges moved for by either party in writing must be given or refused in the terms in which they are written" does not prevent the judge giving an oral explanatory charge, but does prohibit him from qualifying, limiting, or modifying the charge requested; and that the explanatory charge must, in its purpose and effect, merely simplify or relieve the charge of involvement or obscurity, or prevent misunderstanding and misapplication).

The modification should be appended to the requested charge, and in such a manner as to show the precise charge and the precise modification and to make the whole intelligible to the jury, so that no injury may result to the party making the request. *Missouri P. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835.

And it should be applicable to the facts. *Chesapeake & O. R. Co. v. Yost*, 16 Ky. L. Rep. 834, 29 S. W. 326.

But it must not deny the party what he is entitled to. *Mallonee v. Duff*, 72 Md. 283, 19 Atl. 708.

In New Mexico, a statute empowers the court to modify instructions asked, indicating the modifications by such words as "changed thus," but prohibits any modification by any interlineation or erasure. This statute, however, was held, in *Denver & R. G. R. Co. v. Harris*, 3 N. M. 114, 2 Pac. 369, to be directory merely; and an erasure, although a clear violation of the statute, was held to be no such irregularity as required reversal, inasmuch as no prejudice resulted from it.

And, in Ohio, a statute forbids the judge from orally qualifying, modifying, or in any manner explaining to the jury a requested instruction which is given. *Caldwell v. Brown*, 9 Ohio C. C. 691. The court may of course refuse it, if the instruction could not properly be given; and, even if it is good law, if the proposition of law should afterward be embodied in the court's general charge.

¹*Rolfe v. Rich*, 149 Ill. 436, 35 N. E. 352; *Rogers v. Leyden*, 127 Ind. 55, 26 N. E. 210; *Missouri P. R. Co. v. Cullers*, 81 Tex. 382, 13 L. R. A. 542, 17 S. W. 19. Especially where the qualification itself would be erroneous. *Tobin v. Omnibus Cable Co.* (Cal.) 34 Pac. 124. In *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. Terr. 353, 19 Pac. 25, objection was made that modifications were not made to certain numbered instructions; but it was held enough that the modifications were given in other instructions practically embracing those refused.

²*Keenan v. Missouri State Mut. Ins. Co.* 12 Iowa, 126; *Vaughan v. Porter*, 16 Vt. 266; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Murray v. Woodson County Comrs.* 58 Kan. 1, 48 Pac. 554.

³*Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767.

9. — marking instructions "given" or "refused."

Statutes in several states make it the duty of the judge to mark each requested instruction "given" or "refused;"¹ and, although they are sometimes held to be mandatory,² it is usually sufficient if there is a substantial compliance with these statutes.³

But mere omission to so mark instructions is not fatal error if it can be ascertained which were given and which were refused.⁴ Nor is it error to omit to mark instructions "given" if they were in fact given,⁵ or to omit to mark "refused" an instruction which was in fact rejected.⁶ Otherwise, however, of failure to mark "refused" on an instruction refused, which should have been given.⁷

¹For example, see Alabama Code, § 2756. And see the various codes and statutes for other like statutes.

²*Tyree v. Parham*, 66 Ala. 424; *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 431, 66 N. W. 814, 8 S. D. 634, 67 N. W. 837.

They are generally, however, regarded as directory merely. *Turley v. Griffin*, 106 Iowa, 161, 76 N. W. 660. And see cases in notes following.

*As where the judge writes "refused" on the first of several sheets fastened together, on each of which is written the instruction requested. *Harvey v. Tama County*, 53 Iowa, 228, 5 N. W. 130; *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783; *Lawrenceville Cement Co. v. Parker*, 21 N. Y. Civ. Proc. Rep. 263, 15 N. Y. Supp. 577.

Or writes "the foregoing are all refused" at the bottom of the last sheet. *Territory v. Baker*, 4 N. M. 236, 13 Pac. 30.

And an instruction, or a series of instructions, headed, "Instructions given by the court on its own motion," and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties, is a sufficient compliance with the Nebraska statute. *Gillen v. Riley*, 27 Neb. 158, 42 N. W. 1054.

Under the Alabama statute the presiding judge, in marking a charge "given" or "refused," is required only to sign his name thereto, and not in addition to attach thereto the title "Judge." *Kennedy v. Smith*, 99 Ala. 83, 11 So. 665.

**Harrigan v. Turner*, 65 Ill. App. 469.

**World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Cleveland, C. C. & St. L. R. Co. v. Huston*, 75 Ill. App. 651; *Turley v. Griffin*, 106 Iowa, 161, 76 N. W. 660.

Nor is failure to so mark instructions given fatal error, notwithstanding a subsequent statute providing that neglect or refusal by the court to perform any duty enjoined by the preceding sections (which includes so marking instructions) shall be fatal error, where the appellant excepted to the instructions given by noting his exceptions on the instructions themselves, although he specially excepted to the failure of the court to so mark them. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308.

And a party whose requested charges were properly refused and afterwards given by the consent of his adversary and marked "given by consent," cannot complain because they were so given and so marked. *Kansas City, M. & B. R. Co. v. Sanders*, 98 Ala. 293, 13 So. 57; *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65.

**McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783. Failure to so mark an instruction refused amounting to the same thing as if so marked. *Clapp v. Martin*, 33 Ill. App. 433.

**Calef v. Thomas*, 81 Ill. 478.

If the presiding judge should refuse on request to express in writing the giving or refusal of instructions, and the party aggrieved should reserve an exception, the error would be cause of reversal, for the judge would have denied a right the statute confers, and deprived the party of the opportunity of revising in an appellate tribunal the correctness or incorrectness of the instructions. But the mere failure of the judge from inadvertence to indorse the instructions, the party complaining not directing attention to the failure, and taking no exception at the time of its occurrence, will not be heard on error to complain of it. *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831

10. Amended or substituted requests.

After unreasonable requests have been rejected, it may still be error to refuse to listen to specific requests which would have been proper if made alone in the first instance.¹

¹*DeBost v. Albert Palmer Co.* 35 Hun, 386.

11. Requiring the charge to be in writing.

In the absence of any express statutory or constitutional requirement in relation thereto, whether or not the charge to the jury shall be in writing is discretionary with the trial court.¹

¹*Baer v. Rooks*, 4 U. S. App. 399, 50 Fed. Rep. 898, 2 C. C. A. 76; *Gulf, C. & S. F. E. Co. v. Campbell*, 4 U. S. App. 133, 49 Fed. Rep. 354, 1 C. C. A. 293.

Where the instruction is definite, and contains sound views of the law applicable to the case and intelligible to the jury, it can make no essential difference whether it is communicated to them in writing or orally. It is true that in the trial of causes and the exposition of the law to the jury, the reduction of the instruction to writing is certainly more formal, less liable to hasty error, and may enable the court the better to mature their views, and more distinctly and formally to express them to the jury, as a general rule; but still the law may be sufficiently expounded to the jury through oral instructions. No doubt the court would not hesitate, where it was requested, and deemed by counsel to be material, to embody their views in writing, in advance of any oral communication to the jury. This matter, however, is left to the sound discretion of the trial court, and is not the subject of review.

But when verbal instructions are given to the jury, it is certainly the right of the party who desires to except thereto to have them reduced to writing, as was done in *Smith v. Crichton*, 33 Md. 103, so that they may be reviewed on appeal; and where that is done it is no good cause of complaint that the court in its discretion chose in the first instance to charge the jury orally.

12. — statutes.

In many of the states, however, statutes or constitutional provisions make it the duty of the court to reduce to writing the charge or general instructions to the jury,¹ if required by either party;² and, although there are cases in which these statutes have been held to be directory merely,³ they are generally held to be mandatory and must be strictly complied with.⁴ Hence to charge orally,⁵ despite a proper request for a written charge,⁶ is error requiring a reversal of the judgment,⁷ unless the requirement has been waived by consent⁸ or otherwise.⁹

Whether it is essential to the validity of a written charge, within the sense of these statutes, that the judge giving it shall himself have written every part of it, is contested.¹⁰

In Wisconsin, the judge must, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury, unless a written charge be waived by counsel at the commencement of the trial, and except that the charge or instruction may be given orally if taken down by the official stenographer. *Sanb. & B. Wis. Stat. 1898, § 2853.*

And, in Michigan, the court's charge must be in writing. *How. Anno. Stat. § 6481.*

So, in Nebraska, unless waived, and the waiver entered of record. *Neb. Comp. Stat. chap. 19, §§ 52 et seq.* Prior to the passage of this statute, however, the practice of giving oral instructions was the rule, although either party had the right to require the judge to reduce his instructions to writing; and some of the judges prior thereto, for greater certainty, almost invariably did instruct in writing. The statute, however, was passed to make the duty compulsory. *Yates v. Kinney, 23 Neb. 648, 37 N. W. 590.* See also cases in note 5, *infra*.

For example, see 2 *Kan. Gen. Stat. 1897, chap. 95, § 285; Ark. Const. art. 7, § 23; Mansf. Dig. § 5131.*

***Parker v. Chancellor**, 78 *Tex. 527; Toby v. Heidenheimer*, 1 *Tex. App. Civ. Cas. (White & W.) § 795, p. 439.* Contra, *Levy v. McDowell*, 45 *Tex. 220.*

According to *Scheuing v. Yard*, 88 *Pa. 286*, neglect or omission of the judge to reduce to writing his answers to points presented in writing and read them to the jury before they retire, is not available error, although the statute undoubtedly makes it the judge's duty so to do, but does not declare that the omission shall be fatal error.

The words of the court on such occasions are too weighty and decisive in their influence on the jury to be omitted. A particular turn of expression, given perhaps at random, may be decisive of the rights of the parties. The proper construction of the statute therefore is that the whole charge should be in writing; and that it should be given literally as it is thus written. *Rising-Sun & V. Turnp. Co. v. Conway*, 7 *Ind. 187.*

In *Southern Exp. Co. v. Van Meter*, 17 *Fla. 783, 35 Am. Rep. 107*, the judge had refused instructions requested by the defendant and orally charged the jury. Subsequently, and before the jury retired, written instructions offered by the plaintiff were given to the jury, the court stating that they were substantially the oral charge he had given and that he adopted them as his instructions. This was held to be a substantial compliance with the statute requiring the instructions to be wholly in writing.

In *Powers v. Hazelton & L. R. Co.* 33 *Ohio St. 429*, the court, after reading a written charge to the jury, added an unwritten remark to which, just as soon as the jury had retired, exception was taken because not in writing; whereupon the judge recalled the jury, added the remark in writing to the charge, and read it to the jury. And this action of the court was sustained on appeal.

And in *Harvey v. Tama County*, 53 *Iowa, 228, 5 N. W. 130*, instructions written in pencil were held a sufficient compliance with the statute.

***Penderthy v. Lee**, 51 *Wis. 261, 8 N. W. 116; Hartwig v. Gordon*, 37 *Neb. 657, 56 N. W. 324.*

**National Lumber Co. v. Snell*, 47 Ark. 407, 1 S. W. 708; *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343; *Bradway v. Waddell*, 95 Ind. 170; *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *Scruton v. Hall*, 6 Kan. App. 714, 50 Pac. 964; *Louisville & N. R. Co. v. Banks*, 17 Ky. L. Rep. 1065, 33 S. W. 627 (Civ. Code, § 317, subsec. 5); *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 442, 15 S. E. 193; *Equitable F. Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135, 18 S. W. 121; *Columbia Veneer & Box Co. v. Cottonwood Lumber Co.* 99 Tenn. 122, 41 S. W. 351 (Mill. & V. Code § 3672); *Householder v. Granby*, 40 Ohio St. 430.

And failure of the court to put its charge in writing as required by statute is not excused by the fact that it was impracticable to do so in the time within which it was necessary to conclude the trial. *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193.

*There are cases, however, which hold that failure to charge in writing is not such an error as will reverse if it is manifest that no injury could result to the party complaining. *Greathouse v. Summerfield*, 25 Ill. App. 296; *Walsh v. St. Louis Drayage Co.* 40 Mo. App. 339. Contra, *Shafer v. Stinson*, 76 Ind. 375. And see notes 5 and 6, *supra*.

**Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Gaynor v. Pease Furnace Co.* 51 Ill. App. 292; *Fitzgerald v. Fitzgerald*, 16 Neb. 413, 20 N. W. 269; *Ohio & M. R. Co. v. Sauer*, 4 Ohio C. C. 466; *Stringham v. Cook*, 75 Wis. 589, 44 N. W. 777.

*As by silence, or failure to object at the time, or failure to request that the charge be in writing. *Anderson v. State*, 34 Ark. 257; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Sutherland v. Hanken*, 56 Ind. 343; *Jaqua v. Cordesman & E. Co.* 106 Ind. 141, 5 N. E. 907; *Head v. Langworthy*, 15 Iowa, 235; *Bird & M. Map Co. v. Jones*, 27 Kan. 177; *Davis v. Wilson*, 11 Kan. 74; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161.

Failure to except to the direction of the court to the official stenographer to take down and write out the charge was held, in *Shafer v. Stinson*, 76 Ind. 374, not to be a waiver of the right of the party to have the charge in writing on proper requests being made.

*Thus, *Sellers v. Greencastle*, 134 Ind. 645, 34 N. E. 534, holds that reading to the jury a statute as part of the charge without incorporating into the charge the statute as read violates such a statute. Contra, *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389. See also *Burns v. State*, 89 Ga. 527, 15 S. E. 748, where the judge wrote the number of the section in the charge at the place where it was read, followed by the word "read," and read the section *verbatim* from the Code itself.

On the other hand, it has been held that the judge may write part, and adopt the charge of another judge in part, or wholly. *Ohio & M. R. Co. v. Sauer*, 4 Ohio C. C. 466. Or incorporate extracts from law or other books, dictate the whole to an amanuensis before delivery, and read from his copy (*Barkman v. State*, 13 Ark. 706), or have it printed and read from slips.

The main idea to be considered (whether it be in the handwriting of the judge or in that of another), according to *Householder v. Granby*, 40 Ohio St. 430, is, Did the judge adopt it as *his* charge in the case and

was it in such form that the jury could read it in their retirement in case they have misapprehended during its reading by the court?

13. — what must be in writing.

Statements of rules of law governing the matters in issue, or the amount of recovery, are instructions within the terms of these statutes.¹

¹*Harvey v. Keegan*, 78 Ill. App. 475; *Bradway v. Waddell*, 95 Ind. 170 (error to charge orally as to nominal damages). So held of an instruction that the jury must try the case upon the sworn evidence of witnesses, independent of their knowledge of facts known to them but not proved, and that such knowledge is not to influence them. *Equitable F. Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135, 18 S. W. 121. And see notes 5 and 6, of preceding section.

But the court certainly has the right to orally rule upon the admissibility of evidence, or upon any other question that may arise in the course of the trial, and to give its opinion as to the law governing the same. *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146. Or to state orally the purpose for which evidence is admitted. *Farmer v. Thrift*, 94 Iowa, 374, 62 N. W. 804. Or that certain facts stated are admitted. *Hinckley v. Horazdowsky*, 133 Ill. 359, 8 L. R. A. 492, 24 N. E. 421.

So he may orally instruct the jury to disregard evidence, as to the form of the verdict, and the like. *Bradway v. Waddell*, 95 Ind. 170, and cases cited; *Illinois C. R. Co. v. Wheeler*, 149 Ill. 525, 36 N. E. 1023. Contra, as to form of verdict. *Burns v. State*, 89 Ga. 527, 15 S. E. 748 (criminal case).

And general remarks to the jury as to their duties as jurors, and not relating particularly to the case on trial, need not be in writing. *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055.

An oral statement that an instruction read to the jury was read by mistake, and that they should not consider it, was held not to be an oral instruction, in *Wall v. State ex rel. Kendall*, 10 Ind. App. 530, 38 N. E. 190. So, also, in *Dodd v. Moore*, 91 Ind. 522, of an oral statement that the "plaintiff has requested some instructions which are in writing, and I will read them first, and I read them as the law." See also, *Ohio & M. R. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218, where the judge during the reading of the written charge stopped and said "That is not correct; I'll read that again," and thereupon reread the instruction.

Nor need a direction that the jury retire and bring in a verdict covering the issues of the case, where they have brought in an informal verdict, be in writing. *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670.

In Illinois and Georgia a peremptory instruction to find for one of the parties should be given in writing. *Kean v. West Chicago Street R. Co.* 75 Ill. App. 38, and cases cited; *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758. But an oral announcement to counsel in the presence of the jury that it would give such an instruction, followed by the instruction in writing, is not available error. *Brewer & H. Brewing Co. v. Boddie*, 162 Ill. 346, 44 N. E. 819.

But in Iowa, direction of a verdict is not an instruction in the sense of a statute requiring instructions to be in writing. *Leggett & M. Tobacco Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417. And according to *Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36, a verbal direction to a jury which have rendered a verdict in gross violation of the charge, to retire a second time and return a verdict in accordance with the charge given them, is not available error.

14. — charge taken down by stenographer.

Whether or not it is a sufficient compliance with the statute that an oral charge is taken down by the official stenographer and subsequently reduced by him to writing is contested.¹

¹It is sufficient by the express terms of the Wisconsin statute (Sanb. & B. Stat. 1898, § 2853). But it is not enough for the judge to certify in the bill of exceptions that the charge was oral and that the reporter had stated to the court that he had taken it down, but had lost it. *Penberthy v. Lee*, 51 Wis. 261.

In Nebraska, where the statute requires all instructions to be in writing and filed with the clerk before being given to the jury, unless the writing is waived as provided by the statute, it seems that instructions given orally by consent may be taken down by the stenographer, but that they must be reduced to writing and filed with the clerk before the case is finally submitted to the jury, and that the filing is not waived by mere permission to give the instructions orally, as it is the duty of the stenographer to take down all oral proceedings in court and reduce the same to writing. *Yates v. Kinney*, 23 Neb. 648, 37 N. W. 590.

That it is not sufficient, see *Shafer v. Stinson*, 76 Ind. 374; *Crawford v. Brown*, 21 Colo. 272, 40 Pac. 692 (where the oral charge was taken down by the stenographer, and immediately reduced to writing and handed to the jury before their retirement); *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254.

15. — charge subsequently reduced to writing.

So, also, there is conflict as to whether a statutory or constitutional requirement that the charge and instructions be in writing is satisfied by the subsequent reduction to writing of a charge or instructions given orally.¹

¹Thus, in *National Lumber Co. v. Snell*, 47 Ark. 407, 1 S. W. 708, where an instruction given orally, despite a timely request that it be in writing, was subsequently, during argument, reduced to writing, and, after the argument read to the jury in connection with the other instructions, it was held that there was no error demanding a reversal.

But, according to *Toledo, W. & W. R. Co. v. Daniels*, 21 Ind. 256, it is not enough for the judge to set out in writing in the bill of exceptions, upon objection being made to the charge being oral, the mere words used by him in his verbal charge.

16. — oral explanations, modifications, additions, etc.

The court has no power under these statutes to explain, modify, add to, or otherwise change its written charge, except in writing.¹

¹*Dorsett v. Crew*, 1 Colo. 18; *City Bank v. Kent*, 57 Ga. 283; *McEuen v. Morey*, 60 Ill. 32; *Bradway v. Waddell*, 95 Ind. 170; *Head v. Langworthy*, 15 Iowa, 235; *O'Donnell v. Segar*, 25 Mich. 367; *Hartwig v. Gordon*, 37 Neb. 657, 56 N. W. 324; *Currie v. Clark*, 90 N. C. 360; *Columbia Veneer & Box Co. v. Cottonwood Lumber Co.* 99 Tenn. 122, 41 S. W. 351.

So, in Alabama, the court cannot orally correct its written charge. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371. Nor can it orally modify the charge. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238. But it may orally explain the charge. *Ibid.*

17. — numbering paragraphs of the charge.

Statutes sometimes make it the duty of the court to give its written charge in consecutively numbered paragraphs;¹ but mere failure so to do is not fatal to the charge unless prejudice has resulted therefrom,² and upon a timely objection an exception has been saved.³

¹As, for example, N. M. Comp. Laws, § 2050.

²*Miller v. Preston*, 4 N. M. 396, 17 Pac. 565.

³*Gibson v. Sullivan*, 18 Neb. 558, 26 N. W. 253.

18. — signing the charge.

Failure to comply with a statute requiring the charge to be signed by the court¹ is fatal to the charge if a timely and proper exception has been saved.²

¹Unless there is such a statute to this effect it is no objection that the court has not signed its charge. *Hunter v. Parsons*, 22 Mich. 96.

²*Tyree v. Parham*, 66 Ala. 424; *Jones v. Greeley*, 25 Fla. 629, 6 So. 448. Contra, *Parker v. Chancellor*, 78 Tex. 524, 15 S. W. 157 (holding that no possible harm could result from the omission).

19. Form and style generally.

It belongs to the judicial office to exercise discretion as to the form and style in which to expound the law and comment on the facts,¹ so long as the court shall, in the exercise of that discretion, fairly and fully inform the jury of the rules and principles of the law applicable to the case by which they are to be guided in forming their verdict.²

And it is not error for the court in its charge to refer to other paragraphs thereof.³

¹*Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Noble v. Worthy* (Ind. Terr.) 45 S. W. 137; *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed.

403. And unless there be error prejudicial to the party complaining it is no ground for complaint that another and better mode could have been adopted. *Gulf, C. & S. F. R. Co. v. Dunlap* (Tex. Civ. App.) 26 S. W. 655.

²So, whether the charge be but a single proposition, or several propositions set forth in one or more paragraphs or in the form of separate and distinct sentences which can be intelligently read only as a whole. *Terre Haute & I. R. Co. v. Eggmann*, 159 Ill. 550, 42 N. E. 970; *Atchison, T. & S. F. R. Co. v. Calvert*, 52 Kan. 547, 34 Pac. 976.

Nor is the court called upon to adopt the categorical form which counsel choose to present to it. *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403, and cases cited. See also, *Ruling on Requests; in General, supra*, § 6.

An instruction was held not to be erroneous merely because it began with the formula "the jury are instructed for the plaintiff," although the form was criticised as objectionable in *Illinois C. R. Co. v. Larson*, 152 Ill. 326, 38 N. E. 784.

But the court should refrain from the use of expressions calculated to excite prejudice and hostility in the minds of the jury against one party and sympathy for another, and not tending to induce a deliberate and impartial consideration and determination of the issues. *Hogan v. Central Park, N. & E. River R. Co.* 124 N. Y. 647, 26 N. E. 950 (error to so indulge).

³*O'Leary v. German American Ins. Co.* 100 Iowa, 390, 69 N. W. 686.

20. Clearness, definiteness, and certainty.

The court's charge in chief and all instructions given by it, whether of its own motion or upon request of counsel, should be clear, definite, and certain;¹ but a mere slip of the tongue or pen,² or mere inexactness or looseness in its verbal structure,³ is not fatal to a charge or instruction otherwise unobjectionable, if the jury were not misled. Nor is verbosity, if, stripped of its verbiage, the charge still contains the essence of the law applicable to the facts.⁴

And it is incumbent upon the party making a request to charge the jury to put his proposition in clear, precise, and intelligible form, so that no reasonable ground can be left for misapprehension on the part of the jury; and an instruction ambiguous or unintelligible as requested may properly be refused.⁵

¹*Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902.

Charges to the jury should, if possible, be plain, simple, and easily understood. They should be free from obscurity, involvement, ambiguity, metaphysical intricacy, and tendency to mislead. A charge obnoxious to any of these objections should always be refused, even though, on dissection, it may assert a correct legal proposition. The office and purpose of charges are to enlighten the jury, and to aid them in arriving at a correct verdict, as plain common-sense men. In other words, they

should be made up of plain propositions of law, applicable to the tendency or varying tendencies of the evidence, and they should go no further. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L. R. A. 710, 6 So. 277.

And it is error to so qualify an instruction correct as requested as to render it ambiguous and of doubtful meaning,—especially where the case is a close one from a legal standpoint. *Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902.

But a charge is not objectionable for generalization and abstractions merely leading up to the statement of the law determining the rights and responsibilities of the parties on the issues of fact involved. *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427, 48 S. W. 583.

*Where a charge is so exceptional in the prominence given by repetition to the correct principle that to hold that the jury could have been misled by what was evidently a slip of the tongue or pen on the part of the court would be to impute to the members of the jury such a want of ordinary capacity as would prove them unfit for service as jurors, a new trial is properly refused. *Smith v. King*, 62 Conn. 515, 26 Atl. 1059.

*It is not easy in the midst of a lengthy charge always to choose the best method of expressing an idea, or to speak with absolute accuracy; and it is enough if the language used is such that it may be freely assumed to have been correctly understood. *Davidson v. Kolb*, 95 Mich. 469, 55 N. W. 373.

For some illustrations of cases applying the rule as thus stated, see *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853 (where the context showed the intended meaning of the inaccurate statement); *Exchange Nat. Bank v. Darrow*, 154 Ill. 107, 39 N. E. 974 (where, when taken in connection with the other instructions, the instruction complained of was fully explained); *Baltimore & P. R. Co. v. Cumberland*, 12 App. D. C. 598 (where, although to some extent misleading, the instruction was accompanied by an explanation so clear and ample as to leave no doubt as to its meaning); *Chicago & A. R. Co. v. Anderson*, 166 Ill. 572, 46 N. E. 1125 (where the difference between the words used and the proper words was so slight as to probably not mislead). See also *Berkson v. Kansas City Cable R. Co.* 144 Mo. 211, 45 S. W. 1119 (holding that obscurity or inaccuracy of expression is not material unless it substantially affects the merits of the action).

*The same rule applies to the inadvertent misuse or confusion of terms. See, for example, *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269 (an action for negligent killing, the court in its charge using the word "plaintiff" instead of the word "decedent"); *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206 (where the court, in charging on the subject of preponderance of evidence, used the word "testimony" instead of "evidence"); *Southern Bell Teleph. & Teleg. Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202 (where the court used the word "defendant" for "plaintiff," the context showing that plaintiff was really intended); *O'Connor v. Langdon*, 2 Idaho, 803, 26 Pac. 659 (where the court used the conjunctive "and" instead of the disjunctive "or"; the charge repeatedly and correctly stating the law); *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316 (where the court in

charging as to the rules for weighing testimony, used the word "him" instead of the words "him or her;" the charge being entirely plain and capable of being understood as applying to all the witnesses of either sex). See also *Baltimore & O. S. W. R. Co. v. Faith*, 175 Ill. 58, 51 N. E. 107 (holding that the expressions "ordinary care" and "due care" are convertible terms, and that the use of one in one place, and of the other in another does not constitute error). But see *Alabama C. Coal & C. Co. v. Pitts*, 98 Ala. 285, 13 So. 135 (an action to recover for personal injuries, where the use of the word "direct" and "directly," instead of the appropriate word "approximate" and "approximately," when speaking of the cause of the injuries, was held error).

⁴*Meibergen v. Smith*, 45 Kan. 405, 25 Pac. 881.

⁵*Knobeloch v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962; *Colquhoun v. Wells, F. & Co.* 21 Nev. 459, 33 Pac. 977. But according to *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12, an ambiguous and obscure instruction, not really comprehended by the average juror, but correct upon one construction, should not be wholly refused, but should be properly modified or explained.

But it is not necessary that every possible opportunity for misapprehension be anticipated and guarded against when wording the proposition. Thus, rejection of a request containing a pertinent and material instruction not covered elsewhere in the charge, and not otherwise objectionable than as subject to a possible misapprehension and misapplication by the jury to the evidence, without explanation, was held error in *Parsons v. Lyman*, 71 Minn. 34, 73 N. W. 634, inasmuch as it was the duty of the court to give the explanation of its own motion, if not especially requested so to do by counsel.

And in *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103, 20 Atl. 788, it was held error to refuse a requested instruction, otherwise correct, because it repeated the same idea three times in different phraseology, the different clauses being coupled together by the word "or."

21. Argumentativeness.

Although it is irregular practice to formulate into legal propositions mere argument and inject them into a charge or instruction,¹ giving a charge or instruction objected to as being argumentative is not generally deemed fatal error if it embodies a correct legal proposition, and it is clear that the jury have not been misled.² Otherwise, however, if the charge or instruction is clearly misleading because of its argumentativeness,³ or is also essentially erroneous in other respects.⁴

But it is proper for the court to refuse a requested instruction which is objectionable for argumentativeness.⁵

¹*Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142.

²*Cook v. Rome Brick Co.* 98 Ala. 409, 12 So. 918; *Bray v. Ely*, 105 Ala. 553, 17 So. 180 (holding that giving or refusing argumentative instructions

rests largely in the discretion of the trial court in Alabama, and cannot be revised on appeal); *Western & A. R. Co. v. Roberson*, 22 U. S. App. 187, 61 Fed. Rep. 592, 9 C. C. A. 646; *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474, 23 N. E. 583. See also *Steed v. Knowles*, 97 Ala. 573, 12 So. 75 (where it is held that, although an argumentative or misleading charge should not be given, if, as given, it asserts a correct proposition of law, is not entirely abstract, and its misleading tendencies might have been remedied by an explanatory charge if it had been requested, there is no ground of complaint); *Schaungut v. Udell*, 93 Ala. 302, 9 So. 550 (where it is said that if any modification or qualification is deemed necessary to prevent the apprehended misleading tendency of a charge objected to as argumentative, additional instructions should be asked).

**Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *Cable v. Grier*, 45 Ill. App. 407; *Chisum v. Chesnutt* (Tex. Civ. App.) 36 S. W. 758; *Young v. Merkel*, 163 Pa. 513; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

**Nelms v. Steiner Bros.* 113 Ala. 562, 22 So. 435; *Elston & W. Gravel Road Co. v. People*, 96 Ill. 584. See also *Gooding v. United States L. Ins. Co.* 46 Ill. App. 307 (where an argumentative charge summing up the evidence was held erroneous, summing up the evidence being forbidden by statute); *Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073 (where the charge was erroneous for being argumentative, and for singling out and giving prominence to special facts).

**Jones v. Alabama Mineral R. Co.* 107 Ala. 400, 18 So. 30; *McDonald v. International & G. N. R. Co.* 86 Tex. 1, 22 S. W. 939; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999 (error not to refuse); *Flannery v. St. Louis, I. M. & S. R. Co.* 44 Mo. App. 396; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879; *Boyd v. Starbuck*, 18 Ind. App. 310, 47 N. E. 1079; *Whitlatch v. Fidelity & C. Co.* 21 App. Div. 124, 47 N. Y. Supp. 331.

There is no error in refusing an argumentative instruction, for the reason that instructions should be clear and concise, presenting only the point or matter of law on which the party presenting them may rely. If the party requesting them will not so frame the instruction, but, passing beyond the presentation of the point or matter of law, injects an argument of the case, the trial court does not err in refusing the instruction. See cases just cited. See also *Bates v. Benninger*, 2 Cin. Super. Ct. Rep. 568, where the court, in condemning the practice of injecting an argument into a requested instruction, say "that it seems as if this objectionable practice has arisen from two purposes on the part of those who have adopted it: first, a determination to lose the case before the jury; and next, to reverse the result. The first always succeeds, the other rarely."

22. Consistency and harmony.

The charge and instructions given by the court, whether of its own motion or upon request of counsel, must be consistent and harmonious throughout;¹ and it is a generally recognized rule that to submit the case or an issue to the jury on a charge or instructions not so consistent and harmonious throughout, is an error imperatively demanding

a reversal,² unless it is clearly shown that the jury were not misled³ to the prejudice of the party complaining.⁴

And some of the courts hold that it is the duty of the trial court, if needed, to so modify and harmonize the instructions requested by counsel as to present the law in its proper light,⁵ or to disregard them altogether, and submit the case to the jury on its general charge.⁶

To give the jury two manifestly contradictory rules to apply to a controlling issue is to give them a license to follow on that point their own conceptions of justice outside the rules of law. This is exactly what the instructions by the court are intended to prevent. Their purpose is to give the jurors a definite view of the legal principles governing their action, which are binding on their consciences under their oaths as the law of the case before them. *Willmott v. Corrigan Consol. Street R. Co.* (Mo.) 16 S. W. 500.

But two instructions, which in effect tell the jury that except as to allegations which are admitted, it is incumbent on the pleader to establish the allegations of his pleading, are not objectionable as contradictory. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496.

**King v. Post*, 12 Colo. 355, 21 Pac. 28; *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 173, 20 N. E. 670 (holding that if it is impossible to say that the jury followed correct instructions, rather than incorrect ones, which were inconsistent, reversal is proper); *Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, and cases cited; *Brown v. McAllister*, 39 Cal. 573 (where it is said that if the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail; and it is equally impossible, after the verdict, to know that the jury were not influenced by the instruction which was erroneous, as one or the other must be, when two are repugnant); *Hoyt v. Spokane & P. R. Co.* (Idaho) 35 Pac. 39, and cases cited; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973 (where it is held that if the instructions are contradictory and necessarily tend to confuse or mislead the jury, the error cannot be regarded as harmless); *Solomon v. City Compress Co.* 69 Miss. 327, 10 So. 446, 12 So. 339; *Willmott v. Corrigan Consol. Street R. Co.* (Mo.) 16 S. W. 500, and cases cited (holding that conflicting instructions upon a material point constitute reversible error, unless under exceptional circumstances); *Martinowsky v. Hannibal*, 35 Mo. App. 70 (holding that contradiction and utter irreconcilability alone are enough to necessitate reversal); *Flick v. Gold Hill & L. M. Min. Co.* 8 Mont. 298, 20 Pac. 807; *Farmers Bank v. Harshman*, 33 Neb. 445, 50 N. W. 328; *Black v. Brooklyn City R. Co.* 108 N. Y. 640, 15 N. E. 389; *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.) 25 S. W. 741, and cases cited (holding that if conflicting charges are given, one of which is entirely erroneous, it will be presumed that the jury followed the erroneous charge); *Bleiler v. Moore*, 94 Wis. 385, 69 N. W. 164; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Baker v. Ashe*, 80 Tex. 356, 16 S. W. 36.

Possibly some of these cases only go so far as to hold that, to produce this error, the conflicting instructions must be, the one accurate, and the other inaccurate.

But even though one of them be accurate, and the other equally correct as a legal proposition, but inaccurate as applied to the case, and plainly liable to misconception by the jury, the same result must, of necessity, follow, and the rule remain that such a charge constitutes error. *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 322; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973; *School Dist. v. Foster*, 31 Neb. 501, 48 N. W. 267.

*As where this clearly appears from an examination of all the instructions. *Rock Island & P. R. Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663.

Or where it clearly appears from the special findings of the jury. *Bigelow v. Wygal*, 52 Kan. 619, 35 Pac. 200.

Or where the objection is based in part on what appears clearly to be a typographical error in the omission of a word, and it is a justifiable assumption, from a reading of the whole instruction, that the word was in the instruction as given by the court, but was omitted by an oversight of the printer. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496.

**Dale v. Continental Ins. Co.* 95 Tenn. 38, 31 S. W. 266; *Farwell v. Cramer*, 38 Neb. 61, 56 N. W. 716; *Martin v. Fox*, 40 Mo. App. 664. So in *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62, 11 S. W. 308, although it was conceded that there was a seeming inconsistency in the instructions, the judgment was affirmed, inasmuch as it was so manifestly for the right party. According to *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41, it must appear that the conflict might have injuriously affected the party complaining.

So held, in a libel suit, as to an instruction, stating that defendant was chargeable with negligence in not ascertaining that the article was untrue, and also that he had ascertained and knew its untruth, the undisputed testimony showing that the article was published after notice of its falsity. *Hatt v. Evening News Asso.* 94 Mich. 114, 119, 53 N. W. 952, 54 N. W. 766.

**Rock Island & P. R. Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663.

The instructions asked by the different parties to an action generally proceed upon entirely different theories of the law applicable to the case, and they should be so modified and harmonized as to present the law in its proper light. *Kelley v. Cable Co.* 7 Mont. 77, 14 Pac. 633.

**Kelley v. Cable Co.* 7 Mont. 77, 14 Pac. 633; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

23. Defining and explaining technical terms.

The use of words which have a legal technical meaning should be avoided, or, if necessarily used, their meaning should be explained.¹

But it is not necessary to explain to the jury the meaning of ordinary words and phrases when they are used in their usual and conventional sense,² or when their meaning, as applied to the case on trial, is readily understood by the jury,³ and the party complaining has asked for no such explanation by the court.⁴

**Kellar v. Shippee*, 45 Ill. App. 377.

It is the safer rule to couch instructions in as plain language as the facts will permit, and where technical phrases are used, to explain them. *Steinkamper v. McManus*, 26 Mo. App. 51.

And words or terms from a foreign language having such legal technical meaning,—as, for instance the terms *de facto* and *de jure*,—should not be used without full explanation of their meaning. *C. Aultman & Co. v. Connor*, 25 Ill. App. 654. There is no presumption of either law or fact that jurors are either versed in the Latin language or acquainted with the meaning of law terms or maxims of the law that are derived from and expressed in a foreign language, no matter how familiar those terms and maxims may be to members of the bar. Of course this does not mean that the mere use of the Latin word or Latin term will render the instruction erroneous. But such words or terms, unless they are in general use among the common people, should not be so used without fully explaining their signification to the jury, and especially when the manner in which they are used and the prominence given them makes them the very gist of the instruction. *C. Aultman & Co. v. Connor*, 25 Ill. App. 654. But see *Lake Erie & W. R. Co. v. Holderman*, 56 Ill. App. 144, holding that the term “prima facie” has become sufficiently anglicized and understood to need no translation.

And a requested instruction containing a term having a technical meaning is properly refused if it omits to define the term. *Whitney & S. Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242.

On the other hand there are words which, though not purely technical, have a certain well-defined meaning which it is the safer course to explain to the jury; but whose unexplained use will not warrant a reversal. As for example, the word “preponderance,” as applied to evidence. *Steinkamper v. McManus*, 26 Mo. App. 51; *Morris v. Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287. Cases might arise, however, in which the use of this expression would be ground for reversal; and such was the opinion of Phillips, P. J., in *Carson v. Porter*, 22 Mo. App. 179, under the peculiar circumstances of that case, although it is not clear that the reversal was predicated upon that ground alone.

So the unexplained use of the phrase “burden of proof” was held not to be reversible error, in *Miller v. Woodman-Todd Boot & Shoe Co.* 26 Mo. App. 57.

¹*Wimer v. Allbaugh*, 78 Iowa, 79, 42 N. W. 587; *Iowa State Sav. Bank v. Black*, 91 Iowa, 490, 59 N. W. 283; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753; *Wragge v. South Carolina & G. R. Co.* 47 S. C. 105, 33 L. R. A. 191, 25 S. E. 76.

Defining a word, in response to a request by the jury, if correctly defined, is not reversible error, although the word is one in common use. *Cobb v. Covenant Mut. Ben. Asso.* 153 Mass. 176, 10 L. R. A. 666, 26 N. E. 230.

²*Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233; *Hogshead v. State ex rel. Allen*, 120 Ind. 327, 22 N. E. 330.

Failure to correctly distinguish between terms possibly capable of being legally distinguished will not require a reversal, if the jury could not

have been misled thereby. *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L. R. A. 615, 25 Pac. 702.

**Wimer v. Allbaugh*, 78 Iowa, 79, 42 N. W. 587; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Wragge v. South Carolina & G. R. Co.* 47 S. C. 105, 33 L. R. A. 191, 25 S. E. 76; *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

24. Stating the issues; singling out, ignoring, and eliminating issues.

The court in giving a charge designed to cover the entire issues should embrace all the essential elements involved in the case.¹

The court, may, however, single out and present to the jury an issue as the main controlling issue, if such is the fact.²

But it is a fatal error to omit or refuse to charge as to a material issue which is supported by evidence.³ Otherwise, however, as to an issue which has been eliminated from the case by withdrawal⁴ or otherwise.⁵

And if a request to charge improperly omits a material issue, the court may refuse it,⁶ or may modify it by supplying the omission.⁷

¹*Plattsmouth v. Boeck*, 32 Neb. 297, 49 N. W. 167. See also *Willmott v. Corrigan Consol. Street R. Co.* 106 Mo. 535, 17 S. W. 490 (where it is held that an instruction which fails to present the issues clearly made is erroneous, if it is so given that the jury understand that they are to rely on it alone); *City & Suburban R. Co. v. Findley*, 76 Ga. 311 (where it is held to be the right and duty of the judge to state to the jury the several contentions of the parties, the only restriction being that he state them fairly to each side).

And an instruction which tends to disparage and undervalue a defense made in entire good faith is improper. *Bachmeyer v. Mutual Reserve Fund Life Asso.* 87 Wis. 325, 58 N. W. 399.

In North Carolina, a statute requires that the issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing and reducing to writing, or by the judge presiding, before or during the trial. Code, § 395. This statute is mandatory and binding equally upon the court and counsel, and it is the duty of the trial judge either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings; and in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, a judgment rendered thereon, a new trial will be granted. *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45, and cases cited. But refusal to submit unnecessary and immaterial issues is not error. *Gilmore v. Bright*, 101 N. C. 382, 7 S. E. 751.

²*Dupuy v. Burkitt*, 78 Tex. 338, 14 S. W. 789; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *General Electric Co. v. Black*, 19 Mont. 110, 47 Pac. 639.

So held where defendant in open court during the progress of the trial admitted all of plaintiffs' claims, except so much thereof as was attacked and affected by one of the pleas filed. *De Graffenreid v. Menard*, 105 Ga. 651, 30 S. E. 560.

But if there are two or more important issues, and there is any doubt as to which is the main one, or that any one of them is such, the court should not single out one and present it as the controlling one. *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254.

**Earl Fruit Co. v. Curtis*, 116 Cal. 632, 48 Pac. 793; *Jackson School Twp. v. Shera*, 8 Ind. App. 330, 35 N. E. 842; *Bailey v. Tygart Valley Iron Co.* 10 Ky. L. Rep. 676, 10 S. W. 234; *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. 909; *Eureka Fertilizer Co. v. Baltimore Copper, Smelting & Roll Co.* 78 Md. 179, 27 Atl. 1035; *Hennig v. Globe Foundry Co.* 112 Mich. 616, 71 N. W. 956; *Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882; *Patterson v. Westchester Electric R. Co.* 26 App. Div. 336, 49 N. Y. Supp. 796; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Dignan v. Spurr*, 3 Wash. 309, 25 Pac. 529.

Where issue is joined on the plea, even though it be a bad one, and the proofs tend to establish its truth, the court must submit the issue and the proof to the jury, and if the effect of the charge as given is to authorize a recovery without regard to this issue, the error is fatal. *An-niston Lime & Coal Co. v. Lewis*, 107 Ala. 535, 18 So. 326.

**Whalen v. Chicago, R. I. & P. R. Co.* 75 Iowa, 563, 39 N. W. 894; *Dupuy v. Burkitt*, 78 Tex. 338, 14 S. W. 789; *Jones v. Missouri P. R. Co.* 31 Mo. App. 614. See also *Heller v. Chicago & G. T. R. Co.* 109 Mich. 62, 66 N. W. 667 (where it is held to be the duty of the court to charge the jury as to which of several grounds set up in his declaration plaintiff is entitled to recover upon, and to eliminate the others); *Crawford v. Georgia P. R. Co.* 86 Ga. 5, 12 S. E. 176 (where it is held incumbent on the court to charge upon only such phases of plaintiff's cause of action as the evidence applies to and plaintiff insists upon at the trial).

**Henion v. New York, N. H. & H. R. Co.* 51 U. S. App. 157, 79 Fed. Rep. 903, 25 C. C. A. 223; *New Haven Lumber Co. v. Raymond*, 76 Iowa, 225, 40 N. W. 820; *Bugbee v. Kendrick*, 132 Mass. 349; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

Thus, a request to charge a point of defense which has been waived by counsel is properly refused. *Fry v. Central Vermont R. Co.* 65 Vt. 242, 26 Atl. 954; *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237.

And it is error to submit an issue raised by allegations of a complaint which have been stricken out on demurrer. *Gulf, C. & S. F. R. Co. v. Frederickson* (Tex.) 19 S. W. 124.

**Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82; *Chicago & W. I. R. Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332, Affirming 54 Ill. App. 387; *Cottrell v. Piatt*, 101 Iowa, 231, 70 N. W. 177; *Reiser v. Portere*, 106 Mich. 102, 63 N. W. 1041; *Stewart v. Outhwaite*, 141 Mo. 562, 44 S. W. 326; *Carruth v. Harris*, 41 Neb. 789, 60 N. W. 106; *Wooters v. Hale*, 83 Tex. 563, 19 S. W. 134.

But if there be an issue, among others, the evidence with respect to which

is inconsistent with the physical facts in the case, no error is committed by eliminating such issue from the case or in ignoring it in the instructions. *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214, (where an instruction as requested embracing such an issue was refused, and an instruction given ignoring it).

¹*Petefish v. Watkins*, 124 Ill. 384, 16 N. E. 248; *McCarty v. Scanlon*, 187 Pa. 495, 41 Atl. 345.

25. Referring to pleadings.

The court should not refer the jury to the pleadings for information as to what the issues are,¹ unless by consent of the parties.²

There are cases, however, which, although not commending the practice, do not regard it as so vicious as to be fatal to the charge unless prejudice has actually resulted therefrom.³

And still others approve the practice as a proper one.⁴

¹*Bryan v. Chicago, R. I. & P. R. Co.* 63 Iowa, 464, 19 N. W. 295; *Hollis v. State Ins. Co.* 64 Iowa, 454, 21 N. W. 774; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366 (recognizing and approving the rule prohibiting this practice, but holding that the instruction complained of was not open to that objection); *Reese v. Hershey*, 163 Pa. 253, 29 Atl. 907; *East Tennessee, V. & G. R. Co. v. Lee*, 90 Tenn. 570, 18 S. W. 268.

It is the province of the court to determine the issues and state them to the jury, and not leave them to ascertain the effect of the pleadings or the issues which they present. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40.

The difficulty which even judges of learning and experience often encounter in defining the issues as joined in the pleadings is argument sufficient in support of the rule. It surely would not conduce to a full and fair trial if jurors, inexperienced in such matters, were left to determine the issues from the pleadings. The necessity of the judge defining the issues is too apparent to be questioned, and, however pressing the demands may be upon the time of the court, a plain and concise statement of the issues should always be given to the jury. *Burns v. Oliphant*, 78 Iowa, 456, 43 N. W. 289.

Although pleadings which are couched in untechnical language may be given to the jury to enable them to *understand* the issues involved, if the language used in the pleading is technical and not such as the jury will be likely to understand clearly, the issues *should be presented in the language of the court*. *Robinson v. Berkey*, 100 Iowa, 136, 69 N. W. 434, and cases cited. But it seems that if the pleadings contain a plain statement of the issues, the court may *use the language of the pleadings*.

²*Burns v. Oliphant*, 78 Iowa, 456, 43 N. W. 289 (where, although it is said that a statement of the issues ought not to be omitted, it is held that a party who has consented to the omission cannot afterwards be heard to complain of it).

³*Texas & P. R. Co. v. Tankersley*, 63 Tex. 57; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931 (holding that an instruction referring to certain items of damages as set out in a bill of particulars did

not probably mislead the jury, though disapproving the practice). And in *Hall v. Carter*, 74 Iowa, 364, 37 N. W. 956, where the pleading was read as a part of, but not incorporated in the charge (the statute requiring the charge to be in writing), the practice was condemned, but reversal was not based on this ground, inasmuch as the special findings returned by the jury indicated that they fully understood the issues.

So held in *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40, where the issues were stated by the court, and the jury were only referred to the petition to ascertain the undisputed terms of the contract for whose violation recovery was sought and the misrepresentations alleged to have been made by the defendant when making the contract.

An instruction given on request which distinctly informed the jury what the facts were "as alleged in the complaint," was approved in *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261 38 N. E. 476.

And a reference by the court to the petition and amendments thereto for a fuller statement of the several items of damages claimed by plaintiff, following a brief statement of those items, was held no error, in *Lanning v. Chicago, B. & Q. R. Co.* 68 Iowa, 502, 27 N. W. 478.

**North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, and cases cited; *Clouser v. Ruckman*, 104 Ind. 588, 4 N. E. 202 (holding so doing to be no error, as the pleadings are, in contemplation of law, always before the jury); *Baltzer v. Chicago, M. & N. R. Co.* 89 Wis. 257, 60 N. W. 617.

26. Separate defenses.

If a defense in abatement is joined in the same answer with a defense in bar, the plaintiff may require that the jury be instructed to render separate verdicts.¹

¹*Gardner v. Clark*, 21 N. Y. 399, 401.

27. Superfluous allegation.

A plaintiff is entitled to go to the jury on a cause of action on contract substantially alleged and supported by evidence, notwithstanding a failure to prove commingled allegations of tort.¹

¹*Graves v. Waite*, 59 N. Y. 156. Contra, under N. Y. Code Civ. Proc. § 549, subd. 4, when the tort is a fraud in contracting or incurring the liability, such as constitutes a ground of arrest.

28. Limiting to issues and evidence.

It is improper for the court, in making a statement of the case, to present any issue unless it is raised by the pleadings, and evidence tending to establish it has been adduced.¹

But it is not improper to refuse an instruction which as requested is outside the issues and evidence.²

As to whether it is proper to submit to the jury an issue raised by evidence admitted without objection, though the issue is not raised by the pleadings, the cases are not in harmony.³

But it is error to submit to the jury, as a disputed question of fact for their determination, an issue which has been admitted by the pleadings,⁴ or one which is established by the uncontradicted evidence.⁵

¹*Alabama C. Coal & C. Co. v. Pitts*, 98 Ala. 285, 13 So. 135; *Bertelson v. Chicago, M. & St. P. R. Co.* 5 Dak. 313, 40 N. W. 531; *Savannah, F. & M. R. Co. v. Tiedeman*, 39 Fla. 196, 22 So. 658; *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 Fla. 636, 16 L. R. A. 337, 11 So. 231; *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968; *Holt v. Spokane & P. R. Co.* (Idaho) 35 Pac. 39; *Lebanon Light, Heat & Power Co. v. Griffin*, 139 Ind. 476, 39 N. E. 62; *Miller v. Chicago, M. & St. P. R. Co.* 76 Iowa, 318, 41 N. W. 28; *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Nugent v. Kauffman Mill Co.* 131 Mo. 241, 33 S. W. 428 (where it is said that issues cannot be raised and disposed of by instructions, which are not made by the pleadings); *Moss v. North Carolina R. Co.* 122 N. C. 889, 29 S. E. 410 (even though it announces a correct abstract proposition of law); *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076; *Gulf, C. & S. F. R. Co. v. Johnson*, 91 Tex. 569, 44 S. W. 1067; *Holt v. Pearson*, 12 Utah, 63, 41 Pac. 560; *Comegys v. American Lumber Co.* 8 Wash. 661, 36 Pac. 1087; *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 47 N. W. 941.

²*Gibson v. Sterling Furniture Co.* 113 Cal. 1, 45 Pac. 5; *Rives v. Jordan*, 99 Ga. 80, 24 S. E. 857; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833; *Tinsley v. Fruits*, 20 Ind. App. 534, 51 N. E. 111; *Hamilton v. Thoen*, 97 Iowa, 737, 66 N. W. 166; *Brent v. Long*, 99 Ky. 245, 35 S. W. 640; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901; *Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W. 369; *Perine v. Grand Lodge A. O. U. W.* 48 Minn. 82, 50 N. W. 1022; *Brown v. Walker* (Miss.) 11 So. 724; *Fischen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745, 73 N. W. 291; *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. 379; *Kane v. New York N. H. & H. R. Co.* 132 N. Y. 160, 30 N. E. 256; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Texas & P. R. Co. v. Johnson*, 90 Tex. 304, 38 S. W. 520, 14 Tex. Civ. App. 566, 37 S. W. 973; *Lawson v. Thompson*, 10 Utah, 462, 37 Pac. 732, and cases cited; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239; *Barker v. Ring*, 97 Wis. 53, 72 N. W. 222.

But it is no reason for rejecting an instruction pertinent to the issues, that it goes further than the issues required, in asking to have submitted a question which the adverse party is not entitled to have submitted. *Long-Bell Lumber Co. v. Stump*, 57 U. S. App. 546, 86 Fed. Rep. 574, 30 C. C. A. 260.

³That it is proper, see *Denver & R. G. R. Co. v. Rosuck*, 7 Colo. App. 288, 43 Pac. 456; *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798, 25 S. E. 377 (holding that if the evidence has been allowed without objection to go to the jury, it is proper, if not incumbent, on the court to tell the jury what they are to do with it); *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. 108 (holding that the court did not err in charging the jury in accordance with the interpretation thus put upon

the pleadings, and acted upon by the parties). And in *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354, where there was a variance between the cause of action stated by the complaint and the evidence, but not between the issue raised by the answer and the evidence, the court deemed the cause of action stated to be binding, and charged accordingly; but it was held on appeal that, inasmuch as the variance was disregarded by both parties (the case in fact being tried on the theory raised by the answer), the charge ought to have been on the facts, rather than the letter of the complaint.

And that it is error to refuse to so charge, see *Madison v. Missouri P. R. Co.* 60 Mo. App. 599.

But that issues so raised cannot be submitted, see *Gulf of California Nav. Co. v. State Investment & Ins. Co.* 70 Cal. 586, 12 Pac. 473; *Doggett v. Simms*, 79 Ga. 252, 4 S. E. 909; *Atchison, T. & S. F. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486; *Glass v. Gelvin*, 80 Mo. 300; *McCready v. Phillips*, 44 Neb. 790, 63 N. W. 7; *Roberts v. Drehmer*, 41 Neb. 306, 59 N. W. 911; *Coos Bay R. Co. v. Siglin*, 26 Or. 387, 38 Pac. 338, and cases cited.

To do so, however, may be harmless error if from the whole record the evidence and charge do not seem to have influenced or affected the verdict. *Atchison, T. & S. F. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486.

**Burke v. Mascarich*, 81 Cal. 302, 22 Pac. 673.

**First Nat. Bank v. Hanover Nat. Bank*, 32 U. S. App. 29, 66 Fed. Rep. 34, 13 C. C. A. 313; *Illinois C. R. Co. v. Davidson*, 24 U. S. App. 354, 64 Fed. Rep. 301, 12 C. C. A. 118.

And that such an instruction may be properly refused, see *Shields v. Orr Extension Ditch Co.* 23 Nev. 349, 47 Pac. 194; *Leak v. Rio Grande Western R. Co.* 9 Utah, 246, 33 Pac. 1045.

29. Conforming to facts in evidence.

The charge and instructions, whether given by the court of its own motion or upon request, should be so framed as to conform to the facts in evidence.¹ And it is error to give a charge or instruction not so framed, no matter how correct the principle of law announced may be;² but not if it is clear that the jury were not in fact misled thereby, to the prejudice of the complaining party,³ or if there is evidence calling for the charge or instruction.⁴

But it is not error to refuse a charge or instruction not based on the facts proved.⁵ Otherwise, however, if there is evidence calling for such a charge or instruction.⁶

¹The charge of the court should not be mere abstract propositions of law, but should be confined to the law applicable to the facts of the case which the evidence tends to establish, and the attention of the jury should be called to the controlling point or points of the case. *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725.

Every point of law submitted for the determination of the court should be reasonably consistent with the evidence, and in such comprehensive

manner that the deduction made therefrom, notwithstanding the force of the other evidence in the cause, is the logical, legal conclusion from the facts assumed. Each point submitted is to be taken as a distinct, independent proposition; and the answer to it may be a simple affirmation or negation of it, or the answer may be accompanied with such qualification as is requisite to a correct exposition of the law. When a case comes up for review, no fact not covered by the hypothesis set forth in the point can be assumed, except such as is embraced by necessary implication. If this were not so the court might, in some cases, affirm the points on both sides; and, whilst in the answers on one side or the other, the true rule might be given, the jury would be allowed to grope in the dark in search of it, with equal chances to arrive at a wrong or a right result. In such case the assumption of certain facts that are not stated would, if known, show the correct rulings on both sides; but the misleading tendency is such as to be manifest error. If these well-established rules of practice are applied to the instructions given to the jury, and the conclusion cannot be other than that they were misleading to the jury, reversal is imperative. *Sidney School Furniture Co. v. Warsaw School Dist.* 130 Pa. 76, 18 Atl. 604.

**Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Bevens v. Barnett* (Ark.) 22 S. W. 160; *Altcona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047; *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211; *Aznoe v. Conway*, 72 Iowa, 568, 34 N. W. 422; *Atchison, T. & S. F. R. Co. v. Whitbeck*, 57 Kan. 729, 48 Pac. 16; *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 39 L. R. A. 161, 38 Atl. 779; *Williams v. Petoskey*, 109 Mich. 260, 66 N. W. 55; *Rugland v. Tollefsen*, 53 Minn. 267, 55 N. W. 123; *Nixon v. Hannibal & St. J. R. Co.* 141 Mo. 425, 42 S. W. 942; *Holmes v. Jones*, 121 N. Y. 461; 24 N. E. 701, Reversing 50 Hun, 345, 3 N. Y. Supp. 156; *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74; *Baltimore & O. R. Co. v. Few*, 94 Va. 82, 26 S. E. 406; *Nye v. Kelly*, 19 Wash 73, 52 Pac. 528; *Oliver v. Ohio River R. Co.* 42 W. Va. 703, 26 S. E. 444.

**Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567; *Hill v. Finigan*, 77 Cal. 267, 19 Pac. 494; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485.

So held where the objectionable charge was followed by a lucid explanation applying the law to the specific facts of the case. *Spring v. Schenck*, 106 N. C. 153, 11 S. E. 646.

Or where, although objectionable in part, considered as a whole the charge clearly and concretely advised the jury concerning the evidence applicable to the issues. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

Or where the verdict was clearly for the right party on the evidence. *Mandell v. Fulcher*, 86 Ga. 166, 12 S. E. 469.

**Atlanta Consol. Street R. Co. v. Keeny*, 99 Ga. 266, 33 L. R. A. 824, 25 S. E. 629; *Hanchett v. Jordan*, 43 Minn. 149, 45 N. W. 617.

So held, also, however inadequate or of little weight the evidence may appear to the court. *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528.

**Lazarus v. Phelps*, 156 U. S. 202, 39 L. ed. 397, 15 Sup. Ct. Rep. 271; *Birmingham Union R. Co. v. Smith*, 90 Ala. 60, 8 So. 86; *Trabing v. Cali-*

fornia Nav. & Improv. Co. 121 Cal. 137, 53 Pac. 644; *Heinberg v. Cannon*, 36 Fla. 601, 18 So. 714; *Flanagan v. Scott*, 102 Ga. 399, 31 S. E. 23; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Noe v. Chicago. B. & Q. R. Co.* 76 Iowa, 360, 41 N. W. 42; *Markland v. McDaniel*, 51 Kan. 350, 20 L. R. A. 96, 32 Pac. 1114; *Pillsbury v. Sweet*, 80 Me. 392, 14 Atl. 742; *Cook v. Gill*, 83 Md. 177, 34 Atl. 248; *Cain v. Mead*, 66 Minn. 195, 68 N. W. 840; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Mulville v. Pacific Mut. L. Ins. Co.* 19 Mont. 95, 47 Pac. 650; *Pease Piano Co. v. Cameron*, 56 Neb. 561, 76 N. W. 1053; *Humphreys v. Woodstown*, 48 N. J. L. 588, 7 Atl. 301; *Missouri P. R. Co. v. Lamothe*, 76 Tex. 219, 13 S. W. 194.

It is the duty of the judge to instruct the jury upon every question of law involved in the case; but not to answer points that raise questions in these merely, or that rest upon the assumption of a fact of which there is not such evidence as to justify the jury in finding it. *Heffner v. Chambers*, 121 Pa. 84, 15 Atl. 492.

**Norwood & B. Co. v. Andrews*, 71 Miss. 641, 16 So. 262; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549, 11 S. E. 269.

30. Burden of proof.

It is error to instruct the jury that plaintiff, by giving evidence of a prima facie case, has shifted the burden of proof to defendant.¹

But if plaintiff has given evidence such as to raise a legal presumption of the existence of the fact alleged, it is not error for the court to instruct the jury that, in weighing the whole evidence together, they may consider that the plaintiff has given prima facie evidence in support of his case and such as is conclusive, if uncontradicted, and that this must be contradicted or disproved by a preponderance of evidence on the part of defendant, or the plaintiff is entitled to recover.²

¹*Heinemann v. Heard*, 62 N. Y. 448; *Jones v. Prospect Mountain Tunnel Co.* 21 Nev. 339, 31 Pac. 642; *Atkinson v. Goodrich Transp. Co.* 69 Wis. 15, 31 N. W. 164 (a negligence case, in which this question is considered at length and many cases are collated and discussed); *Missouri P. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638 (holding such a charge to be upon the weight of the evidence). See also *Blunt v. Barrett*, 124 N. Y. 117, 26 N. E. 318, and *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (applying the same principle to affirmative defenses).

And that it is proper to refuse a request to so charge, see *Spencer v. Citizens' Mut. L. Ins. Asso.* 142 N. Y. 505, 37 N. E. 617; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14. See also *Home Bcn. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332 (holding that, in an action on a life policy in which the defense is suicide, the introduction in evidence by defendant of the proofs of death which show death to have been self-inflicted does not shift the burden on plaintiff to show that the assured did not commit suicide, where the proofs of death and evidence are not inconsistent with the theory of accidental killing).

**Crone v. Morris*, 6 Pet. 598, 620, 8 L. ed. 514, 522; *Kelly v. Jackson ex dem.*

Morris, 6 Pet. 622, 631, 8 L. ed. 523, 526; *Heilman v. Lazarus*, 12 Abb. N. C. 19, see less fully 90 N. Y. 672, in full, 65 How. Pr. 95. See also cases cited in note 1, *supra*.

This rule does not apply when that which is claimed to be a *prima facie* case rests on testimony which raises a question of credibility of witnesses for the jury.

31. Presumption of law.

It is error to refuse to state to the jury what is the presumption of law on a material point in the absence of proof, though the adverse party has already introduced evidence sufficient to sustain a verdict contrary to such presumption, if such evidence be not sufficient to require the jury to find contrary to the presumption.¹

¹*Potter v. Chadsey*, 16 Abb. Pr. 146.

A statute prohibiting a judge from charging on a matter of fact does not forbid his instructing them that a presumption arising in the case is entitled to great weight. *Durant v. Burt*, 98 Mass. 161.

But instructions as to presumptions should be so framed as not to confuse or mislead the jury by neglecting to discriminate between disputable and indisputable presumptions, nor to give them as a presumption, without qualification, that which only justifies an inference either way, that is to say, which is only a presumption of fact.

32. Presumption of fact.

In a state in which it is the practice of the state courts to indicate the opinion of the judge as to what inferences are fairly deducible from the testimony, it is proper for courts of the United States to do the same.¹

¹*Mitchell v. Harmony*, 13 How. 115, 130, 14 L. ed. 75, 82. But *Nudd v. Barrows*, 91 U. S. 426, 23 L. ed. 286, holds that a presiding judge of a Federal court may comment on the evidence and express his opinion upon a question of fact irrespective of what may be the practice in the state court wherein the Federal court is sitting. See, also, *infra*, § 40, note 3. And in *Pennsylvania Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 37 U. S. App. 692, 72 Fed. Rep. 413, 19 C. C. A. 286, 38 L. R. A. 33 (Affirmed on rehearing 43 U. S. App. 75, 73 Fed. Rep. 653, 19 C. C. A. 316, 38 L. R. A. 70), it is held that a charge as to presumptions is more or less in the nature of comment on the evidence, the scope of which is within the discretion of the presiding judge.

33. Assuming specific fact.

A peremptory instruction to the jury as to a specific fact is not erroneous, if the evidence respecting it is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition to such evidence,¹ or if the fact has been unequivocally admitted by the parties, either in their plead-

ing, or at the trial, or otherwise.² Otherwise, however, if the fact be a disputed one concerning which the evidence is conflicting;³ or if there is no evidence concerning it;⁴ or if the evidence shows that it does not exist.⁵

But after the judge has made a full and fair charge he is not bound, though requested by counsel, to instruct the jury for which party to find if they find one way or the other as to particular facts in the case.⁶

¹As where the evidence leaves no room for dispute as to the existence of the fact. *Montclair v. Dana*, 107 U. S. 162, 27 L. ed. 436, 2 Sup. Ct. Rep. 403; *Long v. Booe*, 106 Ala. 570, 17 So. 716; *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Noble v. White*, 103 Iowa, 352, 72 N. W. 556; *Rice v. Rankans*, 101 Mich. 378, 59 N. W. 660; *Alabama & V. R. Co. v. Phillips*, 70 Miss. 14, 11 So. 602; *Ragan v. Kansas City & S. E. R. Co.* 144 Mo. 623, 46 S. W. 602 (especially if the evidence is record evidence); *Wurde-man v. Schultz*, 54 Neb. 404, 74 N. W. 951; *Riley v. Salt Lake Rapid Transit Co.* 10 Utah, 428, 37 Pac. 681. Otherwise, according to some authorities, if the only evidence in regard to the matter is that of an interested party who says he does not know whether such is the fact or not. *Pryor v. Portsmouth Cattle Co.* 6 N. M. 44, 27 Pac. 327. Or his testimony shows selfcontradiction and inconsistencies. *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

²*Long v. Booe*, 106 Ala. 570, 17 So. 716; *Lec v. O'Quin*, 103 Ga. 355, 30 S. E. 356; *Louisville, E. & St. L. Consol. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *McDermott v. Abney*, 106 Iowa, 749, 77 N. W. 505; *McGuire v. Lawrence Mfg. Co.* 156 Mass. 324, 31 N. E. 3; *Mooney v. York Iron Co.* 82 Mich. 263, 46 N. W. 376; *Taylor v. Scherpe & K. Architectural Iron Co.* 133 Mo. 349, 34 S. W. 581; *Bullis v. Presidio Min. Co.* 75 Tex. 540, 12 S. W. 397; *Pellardis v. Journal Printing Co.* 99 Wis. 156, 74 N. W. 99; *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

But an instruction as to a disputed point must not assume that the point is conceded by one party merely because he has not rebutted his adversary's testimony respecting it. *Palmer v. McMaster*, 10 Mont. 390, 25 Pac. 1056.

³*Estis v. Goodbar* (Ark.) 19 S. W. 972; *Swigart v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Long v. Osborn*, 91 Iowa, 160, 59 N. W. 14; *Metropolitan Street R. Co. v. McClure*, 58 Kan. 109, 48 Pac. 566; *Hull v. St. Louis*, 138 Mo. 618, 42 L. R. A. 753, 40 S. W. 89; *Wilkinson v. Johnson*, 83 Tex. 392, 18 S. W. 746; *Kaufer v. Walsh*, 88 Wis. 63, 59 N. W. 460.

That it is proper for the court to refuse such an instruction, see *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Hannah v. Connecticut River R. Co.* 154 Mass. 529, 28 N. E. 682; *Eiseman v. Heine*, 2 App. Div. 319, 37 N. Y. Supp. 861; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584.

⁴*Mohrenstecher v. Westerveldt*, 57 U. S. App. 618, 87 Fed. Rep. 157, 30 C. C. A. 584; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905.

And that it is proper to refuse a request to charge which is objectionable on this ground, see *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. 904; *Lawson v. Metropolitan Street R. Co.* 40 App. Div. 307, 57 N. Y. Supp. 997.

For other cases to the effect that a charge or instruction should conform to the facts in evidence, see *supra*, § 29, notes 1 and 2.

**Burrows v. Dalta Improv. Co.* 106 Mich. 582, 29 L. R. A. 468, 64 N. W. 501; *Jones v. Grossman*, 59 Mo. App. 195; *Texas Land & Loan Co. v. Watson*, 3 Tex. Civ. App. 238, 22 S. W. 873.

**Rexter v. Starin*, 73 N. Y. 601. See, further, *infra*, subdivision D, as to further requests.

34. Instructions as to the evidence; summing up and stating.

The court has power at common law,¹ and sometimes under express statute² or constitutional³ provision, to sum up or state the evidence in its charge to the jury.

But whether that power shall be exercised or not is a matter largely discretionary with the court.⁴

¹*Rose v. Otis*, 5 Colo. App. 472, 39 Pac. 77; *Bellew v. Ahrburg*, 23 Kan. 287; *City & Suburban R. Co. v. Findley*, 76 Ga. 311.

²Thus, an Alabama statute empowers the judge to state the evidence when it is disputed. Ala. Code 1897, § 2336.

So, in North Carolina, a statute provides that the judge shall state in a plain and correct manner the evidence given in the case. Code, § 413.

The Illinois practice act, however, provides that the judge, in charging the jury, shall charge them only as to the law of the case. But this is not the rule in a Federal court sitting in Illinois, notwithstanding this prohibition. *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286.

³As, for example, California Const. art. 6, § 19; Tennessee Const. art. 6, § 9; *Miller v. Stewart*, 24 Cal. 502; *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799 (holding that the judge may state the testimony given as "tending to prove" a matter). But he cannot assume to answer both a question of law and of fact. *Case v. Williams*, 2 Coldw. 239.

But, in South Carolina, the Constitution now in force (art. IV. § 26) declares that the judge shall not charge juries in respect to matters of fact, but shall declare the law; and this prohibition covers any direct reference to the testimony, any expression as to what is evidence, or any remark that would amount to stating the testimony. *Burnett v. Crawford*, 50 S. C. 161, 27 S. E. 645. And it is of course proper to reject an instruction which as requested violates this provision. *Horne v. McRae*, 53 S. C. 51, 30 S. E. 701. But it is also held that, as it would be impossible to declare the law applicable to a case on trial without connecting the legal principles involved with *some state of facts, actual or hypothetical*, it was the intention of the framers of the new Constitution that the trial judge, in charging the law of the case, should lay before the jury the law as applicable to a supposed state of facts, although in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony, either in

whole or in part; and that a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result. In so doing, if he be careful not to repeat any of the testimony, nor to intimate, directly or indirectly, what is in evidence, he will be chargeable neither with stating the testimony nor with charging in respect to matters of fact. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797.

There is also such a constitutional prohibition in Washington. Wash. Const. art. 4, § 16. But this prohibition does not apply to a judge of a Federal court sitting in Washington. See *Sommers v. Carbon Hill Coal Co.* 91 Fed. Rep. 337.

*It is not necessarily the duty of the court to sum up the evidence; it is his privilege to do so. *Wright v. Central R. & Bkg. Co.* 16 Ga. 46.

When the facts are simple, or the judge directs the attention of the jury to the principal questions they have to investigate, by stating the respective contentions of the parties, the failure to recapitulate the evidence is not error. If either party wishes fuller instructions, he should ask for them, and if the material evidence is omitted he should call it to the attention of the court. To permit a party to ask for a new trial because of an omission of the judge to recite all the details of prolix testimony, or for an omission to charge in every possible aspect of the case, would tend not so much to make a trial a full and fair determination of the controversy as a contest of ingenuity between counsel. It is too late certainly after verdict to raise the objection that the judge did not charge upon a particular aspect of the case. *Morgan v. Lewis*, 95 N. C. 296; *King v. Blackwell*, 96 N. C. 322, 1 S. E. 485; *Willey v. Norfolk Southern R. Co.* 96 N. C. 408, 1 S. E. 446, and cases cited. Or omitted to recapitulate any part of the evidence. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032.

And certainly there can be no ground for complaint where counsel on both sides, in response to a question by the court when about to begin its charge, asking if they desired the evidence to be repeated, expressly agreed that it need not be. *Wiseman v. Penland*, 79 N. C. 197.

If the testimony be of a complicated character and difficult of recollection and comprehension, and there be a controversy between the parties as to what facts are deposed to, it would be the duty of the court either to state the testimony, or to recall the witness upon the controverted points for explanation; but when there is no dispute as to the facts testified to and the testimony is not complicated or difficult of recollection, the court may, in its discretion, decline to exercise the power given it without committing error. *Ivey v. Hodges*, 4 Humph. 154.

So, a modification of a requested instruction which was in effect an erasure of a statement of the evidence, but which did not change the legal principle stated, was approved in *Parchen v. Peck*, 2 Mont. 567, the court holding that the trial judge was not required to state the evidence in the form of an instruction.

And a court is never bound, at the request of either party, to go over the evidence in behalf of the party. Often it would be prejudicial to the

opposite party to do so. It cannot be assigned as error that the court declines doing it. *Lowe v. Minneapolis Street R. Co.* 37 Minn. 283, 34 S. W. 33.

35. — stating in detail.

In charging the jury it is largely within the discretion of the trial judge as to how much detail shall be entered into, how minute the reference shall be, and how extended the discussion,¹ provided of course the evidence is presented with fairness and impartiality to both sides,¹ and with substantial accuracy.³

¹*Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744; *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032 (holding a summary sufficient in the absence of a request for its recital in full, or of parts thereof).

It cannot be required that the judge shall rehearse every item of the evidence, or quote any branch of it entire each time that he refers to it. It is sufficient if he gives the outlines and general effect correctly, so as to convey to the jurors the proper idea of the points to which he is referring, and to recall to them the evidence, on their own recollection of which they must make up their verdict. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032, and cases cited. And when, after stating the issue in general terms, the judge goes over the whole case, first of the plaintiff and then of the defendant, witness by witness, briefly as to each, but with substantial accuracy and fairness, he is not required to do so again when referring subsequently to detached parts in connection with particular points of the case; all that is necessary is that he shall leave undisturbed the impartial general presentation the jury already has from him. *Borham v. Davis*, 146 Pa. 72, 23 Atl. 160.

But where the opinions of witnesses as to whether a given condition or state of facts exists are very largely, if not almost entirely, to be depended upon, the charge should call to the jury's attention any contradiction in the testimony of the witnesses, any opposition of views among the experts testifying, and to the fact that the testimony is expert testimony, with an explanation of what expert testimony is, what effect may or should be given to it in determining the case, how the jury should reconcile the contradiction if they can, or if they cannot how they should regard it or act in relation to it. *Richards v. Willard*, 176 Pa. 181, 35 Atl. 114.

³*Rose v. Otis*, 5 Colo. App. 473, 39 Pac. 77.

But it is error to present the proof prominently on one side and omit countervailing evidence entirely on the other. *Wright v. Central R. & Bkg. Co.* 16 Ga. 46; *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006.

⁴If the judge misstates the evidence upon a material fact in issue, resulting in prejudice to one of the parties, reversal is imperative. *Stephens v. Patterson*, 29 Neb. 697, 46 N. W. 154.

But when it is evident that the judge has made a mistake in stating the facts to the jury, it is the duty of counsel to call the judge's attention to the fact at the time; and unless that is done no available exception can be afterward taken by the party who might possibly be prejudiced

by it. *Braunsdorf v. Fellner*, 76 Wis. 1, 45 N. W. 97. So, also, where the statement was not a positive one but was made rather inquiringly by the qualification "I think." *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86, 46 N. W. 123.

36. — stating in language of witness.

The court in stating the testimony need not repeat it *verbatim*, but it is sufficient if the substance is stated.¹

¹*Krepps v. Carlisle*, 157 Pa. 358, 27 Atl. 741; *Strawn v. Shank*, 110 Pa. 259, 20 Atl. 717; *Rose v. Otis*, 5 Colo. App. 472, 39 Pac. 77; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413.

Of course, in referring to testimony, the court should give correctly the substance of it, and caution the jury who have heard it as to their right in determining exactly what fell from the lips of the witness; but the court is not bound to repeat it *verbatim*, nor is the charge, in the hurry of a trial, necessarily to be a polished essay on the law and the facts bearing on the issue. If this were so, the delay incident to jury trials would be a practical denial of justice to suitors.

And it is not every misrecollection of the court of a witness's testimony, or every misstatement of his language, that works material error. It must be in a substantial part of the testimony, and such a misstatement as probably misleads the jury. *Bellew v. Ahrburg*, 23 Kan. 287.

And if the alleged mistakes in narrating the facts are of sufficient gravity, the counsel ought to call the attention of the court to them immediately after the charge. If he does not do so he cannot complain. *Krepps v. Carlisle*, 157 Pa. 358, 27 Atl. 741.

37. — ignoring evidence.

But it is error for the court, when stating the evidence, to ignore material portions of it.¹ And of course an instruction which, as requested, is defective in this respect, is properly refused.²

¹*Harris v. Russell*, 93 Ala. 59, 9 So. 541 (however weak and inconclusive the judge may consider it); *Michigan Pipe Co. v. North British & M. Ins. Co.* 97 Mich. 493, 56 N. W. 849.

And the court in calling the jury's attention to an admission should call attention to it all, and not to a part alone. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679.

²*Birmingham Dry Goods Co. v. Bledsoe*, 117 Ala. 495, 23 So. 153; *Model Mill Co. v. McEver*, 95 Ga. 701, 22 S. E. 705; *Lindeman v. Fry*, 178 Ill. 174, 52 N. E. 851; *Todd v. Danner*, 17 Ind. App. 368, 46 N. E. 829; *Fleckenstein v. Inman*, 27 Or. 328, 40 Pac. 87.

38. — no evidence.

It is the duty of the court to inform the jury, if requested, when there is no evidence of a material fact,¹ unless the complexity of oral evidence renders it more proper to instruct them hypothetically.²

¹*Storey v. Brennan*, 15 N. Y. 524, 69 Am. Dec. 629; *Goodman v. Oregon R. & Nav. Co.* 22 Or. 14, 28 Pac. 894. See also the following cases, approving the giving of such an instruction: *East Tennessee, V. & G. R. Co. v. Markens*, 88 Ga. 60, 14 L. R. A. 281, 13 S. E. 855; *Rogers v. Felton*, 98 Ky. 148, 32 S. W. 405; *Bullock v. Delaware, L. & W. R. Co.* 61 N. J. L. 550, 40 Atl. 650; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804; *Barber v. Roseboro*, 97 N. C. 192, 1 S. E. 849; *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9 (notwithstanding charging upon the facts is prohibited by Constitution); *McClure v. Sparta*, 84 Wis. 269, 54 N. W. 337.

And that the court may properly tell the jury that there is no direct evidence of a fact in issue, where the evidence of such fact is wholly circumstantial, see *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413.

But the slightest evidence from which the jury may properly infer the fact is enough to preclude such instruction. *Bond v. Warren*, 53 N. C. (8 Jones L.) 192. See, also, the following cases, approving the rejection of a request to charge that there was no evidence of a material fact, where in fact there was evidence, though slight, and though conflicting. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Central R. Co. v. State use of Buck*, 82 Md. 647, 33 Atl. 265; *Pomeroy v. Boston & M. R. Co.* 172 Mass. 92, 51 N. E. 523; *Warren v. Halley*, 107 Mich. 120, 64 N. W. 1058. And that it is error to so charge despite such evidence, see *Bisewski v. Booth*, 100 Wis. 383, 76 N. W. 349.

¹*Know v. Fair*, 17 Ala. 503.

39. — disregarding evidence.

The court may instruct the jury to disregard evidence wrongly admitted, although it was admitted without objection and has not been struck out.¹

But a party cannot ask such an instruction, as matter of right, who did not object as soon as the ground of objection was known to him.²

¹*Pennsylvania Co. v. Roy*, 102 U. S. 451, 458, 26 L. ed. 141; *People v. Parish*, 4 Denio, 153; s. p. *Morton v. Beall*, 2 Harr. & G. 136.

Contra, *Becker v. Becker*, 45 Iowa, 239 (on the ground that omitting to object led the other party to rely on its going to the jury, instead of supplying better evidence). See also *Fish v. Chicago, R. I. & P. R. Co.* 81 Iowa, 280, 46 N. W. 998, where it is held that after a party has omitted to object to the introduction of evidence he cannot then question its competency by a motion for a peremptory instruction for a verdict in his favor on the ground of insufficiency of evidence. And in *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030, it is held error to instruct the jury to disregard testimony which has been admitted over or without objection. What is admitted either over objection or without objection should be left for the consideration of the jury, without comment affecting its weight and without devolving upon them the duty of determining its admissibility, a function properly to be performed by the court.

Whether instructions will cure the error is another question.

²*Edge v. Keith*, 13 Smedes & M. 295; *Ganson v. Tift*, 71 N. Y. 48, 56; *Rees v. Livingston*, 41 Pa. 113; *Harrison v. Young*, 9 Ga. 359, 366; *Insurance*

Cos. v. Scales, 101 Tenn. 628, 49 S. W. 743 (no error to refuse such an instruction). And an instruction to disregard received without objection, whose nature is patent, and which properly belongs in the case, was held to have been properly refused, in *Coombs Com. Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

Contra, *Hamilton v. New York C. R. Co.* 51 N. Y. 100, 106; *Barnett v. St. Anthony Falls Water Power Co.* 33 Minn. 265, 22 N. W. 535, 538.

This rule, which I state thus in deference to recent authority, leaves it in the discretion of the judge whether to instruct the jury to disregard or not. If this be sound, the discretion should be controlled by the following distinction: If the objection goes to the means of evidence or the manner of proof,—as, for instance, the competency of a witness, or of oral in lieu of written evidence, or the authentication of a document, or to remoteness in point of time or place on a question of value,—the omission to object or move to strike out should generally be deemed a waiver, giving the adversary, who might have supplied the defect on timely objection, a right to have the evidence go to the jury. But if the objection goes to the substantial relevancy of the fact proved, that is to say, its intrinsic capacity to afford any fair ground of an inference affecting the issue, it ought not to be deemed waived.

40. Expressing opinion on weight.

Unless expressly forbidden by statute or otherwise,¹ it is within the power of the presiding judge to express his opinion upon a question of fact in his charge to the jury.²

But, irrespective of what may be the course of practice in the state courts as to forbidding the presiding judge to express his opinion upon questions of fact in his charge to the jury, a judge of a United States court may do so.³

If the power be exercised, however, it is indispensable that no rule of law be incorrectly stated and all questions of fact ultimately submitted to the determination of the jury.⁴

¹Several of the states have statutes or constitutional provisions prohibiting this practice; and that it is error for the judge, in violation of these prohibitive provisions to do so, see, for example, the following cases: *Kauffman v. Maier*, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; *Wheeler v. Baars*, 33 Fla. 696, 15 So. 584; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765; *Louisville, N. O. & T. R. Co. v. Whithead*, 71 Miss. 451, 15 So. 890; *Knowles v. Nixon*, 17 Mont. 473, 43 Pac. 628; *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, 21 S. E. 429; *Jackson v. Jackson*, 32 S. C. 591, 11 S. E. 204; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030.

And that it is proper to refuse to so charge on the weight of the evidence, see *Flanagan v. Scott*, 102 Ga. 399, 31 S. E. 23; *Ohio & M. R. Co. v. Percy*, 128 Ind. 207, 27 N. E. 479; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Wilson v. Gamble*, 50 Neb. 426, 69 N. W. 945; *Baldwin v. Von der Ahe*, 184 Pa. 116, 39 Atl. 7; *Dickeschied v. Exchange Bank*, 28 W. Va. 341. Or to modify a request by striking out the objectionable portion. *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388.

In Alabama, the judge cannot charge on the effect of the evidence unless requested by counsel to do so. *Parker v. Daughtry*, 111 Ala. 529, 20 So. 362 (error to do so in the absence of such request).

As to whether it is proper practice in New Hampshire, the cases are not agreed. Compare, for instance, *Haven v. Richardson*, 5 N. H. 126; *Patterson v. Colebrook*, 29 N. H. 94; *Cook v. Brown*, 34 N. H. 460; *State v. Pike*, 49 N. H. 416, 6 Am. Rep. 533.

**Cook v. M. Steinert & Sons Co.* 69 Conn. 91, 36 Atl. 1008; *Washington Gas-light Co. v. Poore*, 3 App. D. C. 127; *Blumeno v. Grand Rapids & I. R. Co.* 101 Mich. 325, 59 N. W. 594; *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952 (the practice not commended, but held to be no error, provided the question is fairly left to the jury for their determination); *Castner v. Sliker*, 33 N. J. L. 512; *Foley v. Loughran*, 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651; *Price v. Hamscher*, 174 Pa. 73, 34 Atl. 546; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Barndt v. Frederick*, 78 Wis. 1, 11 L. R. A. 199, 47 N. W. 6. But see *Letts v. Letts*, 91 Mich. 596, 52 N. W. 54 (holding that the use of language from which the jury may infer a clear intimation of the views of the judge on the facts is objectionable); *Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795; *Preston Nat. Bank v. Michigan Mut. F. Ins. Co.* 115 Mich. 511, 73 N. W. 815 (holding that to so modify a request to charge as to give the jury an impression of the judge's personal opinion is reversible error).

*The power of the courts of the United States in this respect is not controlled by the state statutes or constitutional provisions forbidding the judge to express his opinion upon the facts. *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286 (a case from a Federal court sitting in Illinois); *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1 (a case from a Federal court sitting in Georgia), and cases there cited; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365 (a case from a Federal court sitting in Arkansas); *Sommers v. Carbon Hill Coal Co.* 91 Fed. Rep. 337 (a case from a Federal court sitting in Washington). In all of these cases, and many others which might be cited, statutes or constitutional provisions of the state in which the Federal courts were sitting prohibited the judge from expressing any opinion on questions of fact, and some of them even forbade his commenting at all on the evidence. See, for instance, *Sommers v. Carbon Hill Coal Co.* 91 Fed. Rep. 337.

**Rucker v. Wheeler*, 127 U. S. 85, 32 L. ed. 102, 8 Sup. Ct. Rep. 1142, and cases cited. See also cases cited in note 2, immediately preceding.

The line which separates the provinces of the court and of the jury must not be overlooked by the court. Care must be taken that the jury are not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. *Nudd v. Burrows*, 91 U. S. 439, 23 L. ed. 289.

In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the court and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact for his direction in point of law. The distinction is all-important to the jury. The direction of the judge, in the one case, is obligatory upon their consciences, and so they will, and so they ought to, regard it; but his opinion in the other case is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless. *New York Firemen Ins. Co. v. Walden*, 12 Johns. 518, 7 Am. Dec. 340.

The rule has been well stated thus: Where the judge intends, in commenting on facts, merely to indicate an opinion on a question which he leaves to the jury, the proper form of charge is to tell the jury that the cause of action or defense, as the case may be, rests upon a question which the judge specifies, and that it is for them to judge from the evidence whether the fact be one way or the other, and if they should be of the opinion one way they must find for the defendants, and if they thought otherwise, they must find for the plaintiffs.

If, then, the judge deems proper to give his opinion on the fact, for the assistance or satisfaction of the jury, he may do so with utility and safety.

But if he tells the jury that the matters given in evidence are conclusive on the one side, and the matters given in evidence on the other side are not sufficient, and that if the jury agree with him in opinion they ought to find so and so, without more, it is error. *New York Firemen Ins. Co. v. Walden*, 12 Johns. 513, 7 Am. Dec. 340; s. p. *Gordon v. Little*, 8 Serg. & R. 533, 11 Am. Dec. 632; *Allis v. Leonard*, 58 N. Y. 288; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 524, 533. Contra, *Vedder v. Fellows*, 20 N. Y. 126, 130.

It is not error to refuse to express an opinion on the sufficiency of evidence, if the evidence is not sufficient to warrant a peremptory ruling in favor of the party relying on it.¹

¹*Moore v. Meacham*, 10 N. Y. 207.

41. Sufficiency of evidence.

It is error to tell the jury, without qualification, that the evidence raises a presumption of a particular fact, or is sufficient to justify finding a particular fact, if it raises, not a presumption of law, but only a presumption of fact on which they might find either way.¹

¹*Stone v. Geyser Quicksilver Min. Co.* 52 Cal. 315; *Allison v. State*, 42 Ind. 354, 357; s. p. *Read v. Hurd*, 7 Wend. 408.

And that it is proper to refuse to so charge, see *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. 206.

42. Result of testimony.

It is not error to refuse to instruct the jury that if they believe a specified witness, they should find for the party for whom he testified.¹

¹*Chapman v. Erie R. Co.* 55 N. Y. 579, Reversing 1 Thomp. & C. 526; *Dolan v. Delaware & H. Canal Co.* 71 N. Y. 285; *Bailey v. Bailey*, 97 Mass. 373.

But it is not necessarily error to instruct them that the testimony of a witness, if believed, establishes a fact, if the testimony is clear, and they are given to understand they may believe or not. *Russell v. Ely*, 2 Black, 575, 17 L. ed. 258. See also *Alabama G. S. R. Co. v. Moody*, 90 Ala. 46, 8 So. 57; *McKean v. Salem*, 148 Mass. 109, 19 N. E. 21 (where the testimony of the witness was the only testimony on the subject); *Partridge v. Sterling*, 79 Mich. 302, 44 N. W. 614 (where there was no dispute as to the facts testified to by the witness); s. p., where the conflicting witnesses were the parties, *Bellew v. Ahrburg*, 23 Kan. 287.

And an instruction that if the jury believe that a specified witness has told the truth to find for plaintiff, but that if they believe he did not tell the truth, and should believe as testified by the other witnesses, to find for defendant, was held, in *Harris v. Murphy*, 119 N. C. 34, 25 S. E. 708, not to be misleading as raising an inference that more weight in the opinion of the court should be given to the testimony of such witness than to that of the other witnesses whose testimony contradicted his.

43. Circumstantial evidence.

Where the circumstances together are sufficient to sustain the finding of a fact, the adverse party has no right to require that the jury be instructed that separately not one of them is sufficient.¹

¹*Scott v. Lloyd*, 9 Pet. 418, 460, 9 L. ed. 178, 193; *Keenan v. Hayden*, 39 Wis. 558, 561; *Cowan v. Chicago, M. & St. P. R. Co.* 80 Wis. 290, 50 N. W. 180.

44. Alternative propositions.

A party is entitled to have specified charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury from the evidence might legitimately find, and which have not been covered by other instructions.¹

¹*Sword v. Keith*, 31 Mich. 247, 255; *Foster v. People*, 50 N. Y. 598 (criminal case). And following up such instructions with an instruction that if the jury do not find the facts as claimed in them the law as stated in them has no application was held no error in *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731.

But no right to such instructions exists where each party's contention on which he is entitled to recover, if at all, involves but one hypothesis, and

both contentions are utterly inconsistent with each other and both cannot be true. *Morehouse v. Remson*, 59 Conn. 392, 22 Atl. 427 (an action on an oral contract in which the contract was shown to be, according to either party's evidence, one definite contract, each utterly inconsistent with the other).

45. Misuse of evidence.

A party has a right to have the jury instructed that evidence admitted only for a specific purpose cannot be regarded by them for another purpose for which it was incompetent.¹

¹*Henson v. King*, 47 N. C. (2 Jones L.) 385; *Brush Electric Light & P. Co. v. Wells*, 103 Ga. 512, 30 S. E. 533; *Hardy v. Milwaukee Street R. Co.* 89 Wis. 183, 61 N. W. 771; s. p. *Williams v. Mechanics' & Traders' F. Ins. Co.* 54 N. Y. 577; *Weir v. McGee*, 25 Tex. Supp. 20. And see *ante*, Division XX. § 19.

But an instruction which impliedly limits the effect of admissions which are in fact competent as original and independent evidence is erroneous. *Logansport & P. G. Turnp. Co. v. Heil*, 118 Ind. 135, 20 N. E. 703.

46. Affirmative and negative testimony.

It is not error to instruct the jury in an appropriate case that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.¹

¹Such an instruction was approved in *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. ed. 644, and *Griffith v. Baltimore & O. R. Co.* 44 Fed. Rep. 583. In *Missouri P. R. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607, it was held to be the duty of the court upon request to call the attention of the jury to the relative value of positive evidence that signals were given by a railway train approaching a crossing, and merely negative testimony that they were not given. But in *Atlanta Consol. Street R. Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934, a refusal to so charge was held for failure of the request to embody the qualification that other things must be equal and the witnesses of equal credibility. Such, too, was the case in *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686.

On the other hand, there are cases which, while admitting the rule of evidence to be as stated with reference to positive and negative testimony, hold that it is not a proper matter on which to charge the jury, in that it violates the rule forbidding a charge on the weight of the testimony, and that, although they might not reverse because such an instruction was given, they certainly will not regard the refusal of such an instruction as error. *Ohio & M. R. Co. v. Buck*, 130 Ind. 300, 30 N. E. 19; *Atchison, T. & S. F. R. Co. v. Feehan*, 120 Ill. 202, 36 N. E. 1036. For other instances of cases in which refusal to so instruct was sustained, see *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Missouri P. R. Co. v. Johnson*, 44 Kan. 660, 24 Pac. 1116; *Lewis v. Lake*

Shore & M. S. R. Co. 111 Mich. 458, 69 N. W. 642; *Ehrman v. Nassau Electric R. Co.* 23 App. Div. 21, 48 N. Y. Supp. 379; *Olsen v. Oregon Short Line & U. N. R. Co.* 9 Utah, 129, 33 Pac. 623; *Bisewski v. Booth*, 100 Wis. 383, 76 N. W. 349.

47. Testimony of party; when his only evidence.

Where the only evidence of a party is his testimony in his own behalf it is error to instruct the jury that if not improbable nor discredited they must find for him.¹

¹*Lesser v. Wunder*, 9 Daly, 70; s. p. ante, Division XIX. § 17.

The well-established rule followed by the English Court of Chancery, that no one can, on his own testimony (*Whittaker v. Whittaker*, L. R. 21 Ch. Div. 657, 30 Week. Rep. 787), unsupported by corroborative evidence, sustain a claim against the estate of a deceased person,—may be satisfied by corroborative evidence of the acts of the parties and by their documents. *Young v. Wallingford*, 48 L. T. N. S. 756.

48. — when contradicted by himself.

A party's testimony in his own behalf is entitled to no consideration if it is flatly contradicted by his own previous writings.¹

¹*Boyd v. Colt*, 20 How. Pr. 384. It is held in *Juniata Bldg. & Loan Asso. v. Hetzel*, 103 Pa. 507, that in an equity case the uncorroborated testimony of a party impeaching his own written testimony, or varying its effect, is not sufficient to go to the jury. *Lynch v. Pyne*, 10 Jones & S. 11.

49. Conflict between adverse parties' testimony.

Where the evidence is the conflicting testimony of plaintiff and defendant, each in his own behalf, it is error to instruct the jury that to the extent of the conflict, the party having the burden of proof must fail.¹

¹*Kuehn v. Wilson*, 13 Wis. 104, 109; *Salter v. Glenn*, 42 Ga. 64, 82.

50. Omission to call a witness.

The mere omission to call a competent and available witness who has some knowledge of the transactions, which, if the claim of the party omitting is correct, would be favorable, and who is not adversely interested or biased, is a circumstance which the jury may consider;¹ but it is error to instruct them, even when such witness is a party on the same side, that they may infer that his testimony, if he were produced, would be favorable to the other party.²

¹*Reynolds v. Sweetser*, 15 Gray, 78, 79; *Blecker v. Johnston*, 69 N. Y. 309, Reversing 51 How. Pr. 380. It is error to instruct the jury that a party

is bound to call a particular witness who seems to be able to explain evidence against him, if such witness is interested against the party. *Coykendall v. Eaton*, 42 How. Pr. 378.

**Bleecker v. Johnson*, 69 N. Y. 309, Reversing 51 How. Pr. 380. See also *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280, holding that it is not error to refuse to charge that failure to produce one of two favorable witnesses in common possession of certain facts testified to by only one of them raises a fair inference that the facts as testified to by the witness who was sworn are false; and *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101, holding that instructions that it is a presumption of law that evidence wilfully suppressed would be adverse, and that inferior evidence creates a presumption that higher evidence would be adverse, are prejudicial error as applied to evidence objected to when offered and excluded as inadmissible.

There is much conflict of opinion on the question whether the judge may comment on the absence of supposed testimony or documents.

Compare *Daub v. Northern P. R. Co.* 18 Fed. Rep. 625; *Nicol v. Crittenden*, 55 Ga. 497; *Atlanta & W. P. R. Co. v. Holcombe*, 88 Ga. 9, 13 S. E. 751; *Lowe v. Massey*, 62 Ill. 47; *Moore v. Wright*, 90 Ill. 470; *Miller v. Dayton*, 57 Iowa, 423, 10 N. W. 814; *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802; *Fonda v. St. Paul City R. Co.* 71 Minn. 438, 74 N. W. 166; *Sherlock v. German-American Ins. Co.* 21 App. Div. 18, 47 N. Y. Supp. 315, and cases cited; *Carpenter v. Pennsylvania R. Co.* 13 App. Div. 328, 43 N. Y. Supp. 203; *Brooks v. Steen*, 6 Hun, 516; *Hall v. Vanderpool*, 156 Pa. 152, 26 Atl. 1069; *Steininger v. Hoch*, 42 Pa. 432; *Frick v. Barbour*, 64 Pa. 120; *American Underwriter's Asso. v. George*, 97 Pa. 238; *Collins v. Leafey*, 124 Pa. 203, 16 Atl. 765 (where it was said that the reasons why certain evidence which might naturally be looked for may not be produced are so many and so various, and sometimes so difficult of explanation, that obviously this is a kind of argument that requires careful handling, especially when used from the bench. But it is a legitimate instrument in the investigation of truth, and a liberal discretion in its use must be allowed to the trial judge, who is in a far better position to determine the occasion for it than the appellate court possibly can be); *Seward v. Garlin*, 33 Vt. 583; *Clough v. Patrick*, 37 Vt. 421.

51. Refusal to produce document.

A party who refuses on request to produce a document shown to be within his control thereby raises a presumption that if produced it would have tended to support the evidence which the other party, in the absence of the document, is compelled to rely upon.¹

**Clifton v. United States*, 4 How. 242, 11 L. ed. 957 (holding the rule to apply even where there is no question of best and secondary); *Wylde v. Northern R. Co.* 14 Abb. Pr. N. S. 213, 53 N. Y. 156.

52. Cumulative evidence.

If a party has called one witness his neglect to call another to the same point, though a circumstance to be considered in weighing the

evidence that is actually adduced, cannot be given to the jury as a ground for inferring that the testimony of the other might be prejudicial.¹

¹*Bleecker v. Johnston*, 69 N. Y. 309, Reversing 51 How. Pr. 380.

53. Unimpeached and uncontradicted testimony.

The general rule that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the jury, does not apply to the testimony of an interested witness, nor to one whose testimony is intrinsically improbable, or contradicted by circumstances;¹ nor to testimony to a matter of common opinion of facts that are before the jury.²

¹*Koehler v. Adler*, 78 N. Y. 287. See also *Curran v. A. H. Strange Co.* 98 Wis. 598, 74 N. W. 377, recognizing this rule, but holding refusal to so charge in that particular case was not error. But see *Irwin v. Metropolitan Street R. Co.* 25 Misc. 187, 54 N. Y. Supp. 195, where this question is discussed at some length and a refusal to so charge sustained on the ground that the credibility of the witness is for the jury to consider in connection with the other evidence.

But it is error for the court, in his charge, to cast doubt and suspicion on the testimony of an unimpeached defendant who has testified in his own behalf, on no other ground than the opposing counsel's groundless and unrestrained criticism of the evidence in his argument. *Valley Lumber Co. v. Smith*, 71 Wis. 304, 37 N. W. 412.

²See *ante*, Division XIX. § 23.

54. Impeached testimony.

The testimony of a witness who has been impeached should go to the jury, not with an instruction to disregard it wholly, but to be weighed in connection with the other evidence.¹ Whether a witness has been successfully impeached or not is a question for the jury.²

¹*White v. McLean*, 57 N. Y. 670; *Dunn v. People*, 29 N. Y. 523, 87 Am. Dec. 319; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493. See also *Crowell v. McGoon*, 106 Iowa, 266, 76 N. W. 672, sustaining refusal of a requested instruction that the jury might disregard the evidence of any witness if they found from the evidence that his general reputation for truth and veracity in the community in which he resided was bad, unless he was corroborated.

But an instruction that the jury have the right to reject all the testimony of a witness who has been impeached by proof that he has made contradictory and inconsistent statements out of court concerning material and relevant matters, was upheld, in *White v. New York C. & St. L. R. Co.* 142 Ind. 648, 42 N. E. 456, as proper, under a statute providing for impeachment by such proof.

²*Allis v. Leonard*, 58 N. Y. 288.

55. Falsus in uno.

Where a witness testifying to matters material to the issues, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge the jury that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him.¹ But a party is not entitled to have the jury so instructed unless his falsehood is shown to be wilful; but the judge should only caution the jury.²

O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; *Judge v. Jordan*, 81 Iowa, 519, 46 N. W. 1077; *Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616; *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650; *Atkin v. Gladwish*, 27 Neb. 841, 44 N. W. 37; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804; *Roth v. Wells*, 29 N. Y. 471, Affirming 41 Barb. 194; s. p. *People v. Evans*, 40 N. Y. 1.

Some courts, however, hold that such an instruction must be qualified to the extent of telling the jury that they may disregard the witness' testimony unless corroborated. *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411.

In either case, however, it is error, in so charging, to single out and designate by name particular witnesses. *Wastl v. Montana Union R. Co.* 17 Mont. 213, 42 Pac. 772. Accordingly, it is not improper to so modify a request to charge this rule with reference to particular witnesses named as to make it apply to all the witnesses generally. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650.

Pease v. Smith, 61 N. Y. 477, Affirming 5 Lans. 519; *Koehucke v. Ross*, 16 Abb. Pr. N. S. 345, with note. And to the effect that the charge must tell the jury that the falsehood must be wilful, see *Ward v. Ward*, 25 Colo. 33, 52 Pac. 1105; *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382; *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *Cahn v. Ladd*, 94 Wis. 134, 68 N. W. 652.

56. Incredible fact.

Testimony to an intrinsically improbable fact may be disbelieved by the jury, although the witness was uncontradicted and unimpeached.¹

Stillwell v. Carpenter, 2 Abb. N. C. 238 (testimony to good faith); *Staford v. Leamy*, 2 Jones & S. 269, and cases cited; *Tracy v. Phelps*, 22 Fed. Rep. 634 (U. S. Cir. Ct. N. D. N. Y.) 1 Kan. L. J. 38; *Hawkins v. Sauby*, 48 Minn. 69, 50 N. W. 1015.

57. Expert testimony.

Expert testimony is generally held to be properly considered like all other testimony; it must be tried by the same tests and receive just the same weight as the witness is entitled to in connection with all the circumstances of the case,¹ although there are cases to the effect that it is unreliable and to be received with caution.²

But, in either case, the judge, when submitting it to the consideration of the jury, should in no way disparage or discredit it;³ nor, on the other hand, should he unduly accord to it a weight to which it is not entitled.⁴

¹*Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681.

The evidence of experts is neither intrinsically weak nor intrinsically strong. Its strength or its weakness depends upon the character, the capacity, the skill, the opportunities for observation, the state of mind of the expert himself, and on the nature of the case and all its developed facts. Like any other evidence it may be entitled to great weight with the jury, or it may be entitled to little; but of its weight and worth the jury must judge without any influencing instruction, either weakening or strengthening, from the court. *Coleman v. Adair*, 75 Miss. 660, 23 So. 369.

And it is therefore error to instruct the jury that they are to receive expert testimony and weigh it with great caution. *Atchison, T. & S. F. R. Co. v. Thul*, 32 Kan. 355, 49 Am. Rep. 484, 4 Pac. 352.

And charging the jury that expert testimony was to be "received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous," was held to be a violation of the prohibition against charging upon the weight of evidence, in *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890.

But it is proper to tell the jury that expert testimony is to be weighed by them and to aid them in coming to a conclusion as to the question presented to them; but that it is not binding upon their judgment. *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

²*Wilcox v. State*, 94 Tenn. 106, 28 S. W. 312, sustaining a charge that the jury should give the testimony of expert witnesses a careful and painstaking investigation with a view to find out the truth, and to keep from being misled or confused by it, for, as was said by the trial judge, "while expert testimony is sometimes the only means of or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth." See also note to *Hull v. St. Louis (Mo.)* 42 L. R. A. 753, where the conflicting cases on this question are collected and classified.

An instruction that an opinion as to handwriting ought to be received with caution and that direct evidence of the handwriting is entitled to greater weight than such opinions, was sustained in *Buxly v. Buxton*, 92 N. C. 479, as not intimating an opinion upon the evidence. See also *Jackson v. Adams*, 100 Iowa, 163, 69 N. W. 427, where a similar instruction was approved.

³As to underrate too much the value of expert witnesses as a class. *Eggers v. Eggers*, 57 Ind. 461.

Or to so discredit their testimony as that the jury may understand that it is their duty to entirely disregard it. *Weston v. Brown*, 30 Neb. 609, 46 N. W. 826.

And an instruction which in effect excludes it from their consideration, telling them that it is from their own opinion upon the matter and the conclusions they draw from the facts proved that they are to determine their verdict, and not from what other persons say or think, is erroneous. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

So, too, it is error to tell the jury that they are to determine the issue from such personal knowledge as they may have in relation to matters of that kind, when the issue is not one of general knowledge and observation, but one of science upon which no witness not specially qualified as an expert may testify. The jury may think that they can disregard the evidence submitted. *Douglass v. Trask*, 77 Me. 35.

Or to tell them that they may disregard it entirely and base their verdict upon their own observations alone, obtained on a view by them. *Kansas City v. Hill*, 80 Mo. 523.

But it is not error to tell them that they may disregard it if they deem it unreasonable. *St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249.

Nor is it error to tell them not to wholly disregard the testimony and make their finding from their own observation and knowledge, but that they must, in arriving at their verdict, consider the testimony offered, in connection with their own judgment and knowledge as to the matter in question. *Kansas City v. Butterfield*, 89 Mo. 646, 1 S. W. 831.

*As, to tell the jury that the testimony of experts is supposed to be the best that can be furnished. *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.

Or to tell the jury that where the witnesses are of equal capacity the opinions of those who have better means of knowledge are ordinarily of greater weight than the opinions of those who have less means of knowledge. Such an instruction leaves out of view the essential element of credibility and, even if true in fact, it is not a presumption of law. *Fulwider v. Ingels*, 87 Ind. 415. But it is not error to tell the jury that where the question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight so long as the existence of the equality in all things is left to the jury. *Spensley v. Lancashire Ins. Co.* 62 Wis. 443, 22 N. W. 740.

And it is error to give too much prominence to the mere experience of the expert, leaving out of view his opportunities, his aptitude, his skill, and other possible qualifications. *Cueno v. Bessoni*, 63 Ind. 524; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. And an instruction that greater weight is to be given the testimony of witnesses showing the greater knowledge and experience is properly refused. *Mewes v. Crescent Pipe Line Co.* 170 Pa. 369, 32 Atl. 1082.

So, too, it is error to tell the jury, in substance, that a party litigant must meet the testimony of experts given on behalf of his adversary by other

experts, and, having failed to do so, the jury must take it for granted that their conclusions were correct. *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28.

58. Construction and effect of writing.

The construction and effect of writings, if the question arises only from the writings themselves, is for the court.¹ If it depends in part on oral evidence, the question is for the jury.² If the extrinsic facts are ambiguous, the jury should be told what would be the proper construction upon the several different states of facts they might find.³

¹*Stokes v. Johnson*, 57 N. Y. 673; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *Payne v. Pomeroy*, 21 D. C. 243; *Home Friendly Soc. v. Berry*, 94 Ga. 606, 21 S. E. 583; *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356; *Slatten v. Konrath*, 1 Kan. App. 636, 42 Pac. 399; *Jacob Tome Inst. v. Davis*, 87 Md. 591, 41 Atl. 166; *Houston & T. C. R. Co. v. Shirley*, 89 Tex. 95, 31 S. W. 291.

And it is improper to submit to the jury the question of performance of a written contract without any construction of the contract by the court. *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

²*Etting v. Bank of United States*, 11 Wheat. 59, 76, 6 L. ed. 419, 423; *Barreda v. Silsbee*, 21 How. 146, 16 L. ed. 86; *First Nat. Bank v. Dana*, 79 N. Y. 108, 116; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *West v. Smith*, 101 U. S. 270, 25 L. ed. 812, and cases cited; *Roberts v. Bonaparte*, 73 Md. 191, 10 L. R. A. 689, 20 Atl. 918 (where the instruction left to the jury the question, not of the construction of the contract, but what the contract was); *Coquillard v. Hovey*, 23 Neb. 622, 37 N. W. 479; *First Nat. Bank v. Dana*, 79 N. Y. 108 (error to take the question from the jury).

³*Curtis v. Martz*, 14 Mich. 506.

59. Requisite cogency of evidence.

On a jury trial of a civil issue, the issue must be determined by a preponderance of evidence;¹ and it is error to instruct the jury that the evidence must be clear, satisfactory, and conclusive, although the question be one which, if tried in equity, would require that degree of proof.²

¹Various substitutes for "preponderance of evidence," such as "weight of evidence," "balance of probabilities" or telling the jury they must be "satisfied," etc., have been held error in some cases, though sanctioned as harmless in others.

For instances of charges held to be erroneous for exacting too high a degree of proof within this rule, see *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Battles v. Tallman*, 96 Ala. 403, 11 So. 247; *Thompson v. Louisville & N. R. Co.* 91 Ala. 496, 11 L. R. A. 146, 8 So. 406; *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866; *Ashborn v. Waterbury*, 69 Conn. 217, 37 Atl. 498; *Cleveland, C. C. & St. L. R. Co. v.*

Best, 169 Ill. 301, 48 N. E. 684, Reversing 68 Ill. App. 532; *Gumberg v. Treusch*, 103 Mich. 543, 61 N. W. 872; *Sanborn v. Gerald*, 91 Me. 366, 40 Atl. 67; *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87; *Baines v. Ullman*, 71 Tex. 529, 9 S. W. 543; *Puget Sound Iron Co. v. Lawrence*, 3 Wash. Terr. 226, 14 Pac. 869; *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Terr. 38, 13 Pac. 186; *Bachmeyer v. Mutual Reserve Fund Life Asso.* 87 Wis. 325, 58 N. W. 399; *Button v. Metcalf*, 80 Wis. 193, 49 N. W. 809.

And that it is proper to refuse a requested instruction objectionable in this respect, see *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Willis v. Atlantic & D. R. Co.* 122 N. C. 905, 29 S. E. 941. Or to modify it so as to present the true rule. *Treadwell v. Whittier*, 80 Cal. 574, 5 L. R. A. 498, 22 Pac. 206.

But with the foregoing compare the following cases: *Walker v. Collins*, 19 U. S. App. 307, 59 Fed. Rep. 70, 8 C. C. A. 1; *Braddy v. Kansas City, Ft. S. & M. R. Co.* 47 Mo. App. 519; *Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497; *Callan v. Hanson*, 86 Iowa, 420, 53 N. W. 282; *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Knopke v. Germantown Farmers' Mut. Ins. Co.* 99 Wis. 289, 74 N. W. 795; *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 35 L. R. A. 252, 69 N. W. 175.

¹*Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235. Contra, *Brawdy v. Brawdy*, 7 Pa. 157; *Juniata Bldg. & Loan Asso. v. Hetzel*, 103 Pa. 507.

Which of these rulings is sound is too broad a question for discussion here.

I state the rule as in the text in deference to what I understand to be the general practice in New York; but it is a question of radical importance under the new procedure which merges cases of law and equity, and it seems to have escaped adequate consideration in reported cases.

In *Piersol v. Neill*, 63 Pa. 420, 426, the Pennsylvania rule was thus stated: "If, in the opinion of the former (the judge) the facts are not such as should move a chancellor to decree specific execution of the contract, he should give a binding instruction to that effect to the jury and withdraw the case from them; if the case should be sufficient on the testimony, then the jury should be so instructed, and the testimony referred to them to find whether it be true or not."

60. — as to crime.

An allegation of a criminal act, when made in a civil action tried before a jury, is proved by a predponderance of evidence, weighed with the presumption of innocence;¹ and it is error to instruct the jury that it must be proved beyond a reasonable doubt.²

¹*First Nat. Bank v. Commercial Union Assur. Co.* 33 Or. 43, 52 Pac. 1050, sustaining an instruction that a natural presumption of innocence exists in a charge of such a nature, arising from the improbability that a person will commit a criminal act. See also cases in note following.

²This is the better opinion, and finds support in the following cases, some of which reverse for the error, others sustain the refusal of the trial court to so charge, while still others sustain the charge for stating the

rule correctly. *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. 452; *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195; *Edmond N. E. v. State ex rel. Lula E.* 25 Fla. 268, 6 So. 58 (a bastardy case); *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570 (holding that prior to the passage of act of March 4, 1897, a plea justifying speaking words imputing the commission of a crime was to be supported by evidence establishing its truth beyond a reasonable doubt); *Neal v. Smith*, 89 Me. 596, 36 Atl. 1058; *Morley v. Liverpool & L. & G. Ins. Co.* 85 Mich. 210, 48 N. W. 502; *Smith v. Burrus*, 106 Mo. 94, 13 L. R. A. 59, 16 S. W. 881, and cases cited; *Strickler v. Grass*, 32 Neb. 811, 40 N. W. 804 (a bastardy suit); *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503, 7 Abb. N. C. 334, 352; *Johnson v. Agricultural Ins. Co.* 25 Hun, 251 (followed in *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75); *Lewis v. Shull*, 67 Hun, 543, 27 N. Y. Supp. 484; *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. 30, 21 Atl. 638; *Nelson v. Pierce*, 18 R. I. 539, 28 Atl. 806; *Sparta v. Lewis*, 91 Tenn. 370, 23 S. W. 182; *Heiligmann v. Rose*, 81 Tex. 222, 13 L. R. A. 272, 16 S. W. 931; *United States Exp. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957. See also note to *New York Guaranty & Indemnity Co. v. Gleason*, 7 Abb. N. C. at page 357, where many of the conflicting cases on this question are classified.

To the contrary, see *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489; *Elder v. Oliver*, 30 Mo. App. 575 (plea of justification in action of slander). And see Stephen, Dig. Ev. art. 95, and cases cited in authorities in the note above mentioned.

61. Doubtful rule of law.

Where the case turns upon a doubtful question of law, the judge may let it go to the jury under instructions in accordance with apparent authority, so as to settle the question of fact, and then grant an order for new trial, on appeal from which the question can be reviewed.¹

¹*Dickinson v. Edwards*, 2 Abb. N. C. 300.

C. INSTRUCTIONS RELATING TO EFFECT OF VERDICT.

62. Interest on actual damages.

In actions of tort, the judge may leave it to the jury whether to allow interest upon the damages or not,¹ but should not instruct them to allow it.²

¹*Walrath v. Redfield*, 18 N. Y. 457; *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, with note upon interest on sum allowed as damages in 18 L. R. A. 449.

²*Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40; *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83; *Eddy v. Lafayette*, 4 U. S. App. 247, 49 Fed. Rep. 807, 1 C. C. A. 441; *Moore v. New York Elev. R. Co.* 126 N. Y. 671, 27 N. E. 791; *Reiso v. New York Steam Co.* 35 N. Y. S. R. 86, 12 N. Y. Supp. 557; *Home Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182.

Contra, St. Louis, I. M. & S. R. Co. v. Biggs, 50 Ark. 169, 6 S. W. 724; *Varco v. Chicago, M. & St. P. R. Co.* 30 Minn. 18, 13 N. W. 921; *Galveston, H. & S. A. R. Co. v. Johnson* (Tex.) 19 S. W. 867; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113; *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

63. Double or treble damages.

Where the law gives double, treble, or other increased damages the verdict should find single damages as such, unless otherwise directed by the statute, and the court will direct judgment thereon at the increased rate.¹

¹*Beekman v. Chalmers*, 1 Cow. 584; *Newcomb v. Butterfield*, 8 Johns. 342; *King v. Havens*, 25 Wend. 420; N. Y. Code Civ. Proc. § 1184; *Warren v. Doolittle*, 5 Cow. 678; *Loddell v. New Bedford*, 1 Mass. 153; *Swift v. Applebone*, 23 Mich. 252; *Brewster v. Link*, 28 Mo. 147.

In an action for trespassing upon the plaintiff's land and cutting his wood, for which the statute allows treble damages, the jury should find generally for the plaintiff and assess the single value of the wood in terms, or the court will infer that they have found the treble value. *Livingston v. Platner*, 1 Cow. 175.

The assessment of double damages by the jury is held not to be a ground for a new trial in *Quimby v. Carter*, 20 Me. 218.

64. Informing jury as to effect of verdict,—on costs,—on imprisonment.

The judge may, in his discretion, inform the jury what will be the effect of a verdict, in respect to carrying costs,¹ or to justifying execution against the person;² but it is not error to refuse to do so.³

¹*Waffle v. Dillenback*, 38 N. Y. 53, 4 Abb. Pr. N. S. 457, Affirming 39 Barb. 123; *Nolton v. Moses*, 3 Barb. 31; *Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644.

²*Keller v. Strasburger*, 90 N. Y. 379, Affirming 23 Hun, 625; *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. 30, 21 Atl. 638.

A charge that a landlord is criminally responsible for the act of his tenant in obstructing a highway, if he knew of the act and did not dissent, is erroneous in putting before the jury, on the trial of an indictment against the landlord, the probable result of a verdict of guilty. *Com. v. Switzer*, 134 Pa. 383, 19 Atl. 681.

³*Keller v. Strasburger*, 90 N. Y. 379, Affirming 23 Hun, 625.

D. FURTHER REQUESTS AND EXCEPTIONS.

65. Further instructions.

It is error for the judge to refuse to listen to requests for further instructions on specific points, merely because he has already instructed the jury;¹ but when the charge already given covers the entire case and submits it properly to the jury, the court may refuse to give further instructions.²

¹*Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261; *Adams v. People*, 179 Ill. 633, 54 N. E. 296; *Crosby v. Ritchey*, 56 Neb. 336, 76 N. W. 895; *Pfeffele v. Second Ave. R. Co.* 34 Hun, 497; *Louisville & N. R. Co. v. Kelly*, 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260; *Texas & P. R. Co. v. Rhodes*, 30 U. S. App. 561, 71 Fed. Rep. 145, 18 C. C. A. 9; *Mobile & O. R. Co. v. Wilson*, 46 U. S. App. 214, 76 Fed. Rep. 127, 22 C. C. A. 101.

See also *Amended or Substituted Requests*, *supra*, § 10.

¹*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 27 S. W. 453; *Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 681; *Texas & P. R. Co. v. Elliott*, 30 U. S. App. 606, 71 Fed. Rep. 378, 18 C. C. A. 139; *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Bull v. Wagner*, 33 Neb. 246, 49 N. W. 1130; *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406; *Smith v. Hall*, 69 Conn. 651, 33 Atl. 386; *Atlanta R. Co. v. Jett*, 103 Ga. 569, 29 S. E. 767; *Cosgrove v. Cummings*, 190 Pa. 525, 42 Atl. 881; *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 407, 23 S. E. 593; *Watkins v. United States*, 5 Okla. 729, 50 Pac. 88; *Carstens v. Stetson & P. Mill Co.* 14 Wash. 643, 45 Pac. 313; *Chicago, R. I. & P. R. Co. v. Parks*, 59 Kan. 709, 54 Pac. 1052; *Ryan v. Washington & G. R. Co.* 8 App. D. C. 542; *McDonald v. Norfolk & W. R. Co.* 95 Va. 98, 27 S. E. 821; *State v. Fontenot*, 48 La. Ann. 283, 19 So. 113; *Brown v. Southern P. R. Co.* 7 Utah, 288, 26 Pac. 579; *Sage v. Evansville & T. H. R. Co.* 134 Ind. 100, 33 N. E. 771; *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Los Angeles County v. Reyes* (Cal.) 32 Pac. 233; *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496; *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108; *Bernard v. Merrill*, 91 Me. 358, 40 Atl. 136; *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 So. 913; *Long v. Southern R. Co.* 50 S. C. 49, 27 So. 531; *Finance Co. v. Old Pittsburgh Coal Co.* 65 Minn. 442, 68 N. W. 70; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Territory v. Pendry*, 9 Mont. 67, 22 Pac. 760; *Bobo v. State* (Miss.) 16 So. 755; *Thompson v. Holyoke Street R. Co.* 170 Mass. 365, 49 N. E. 748; *Pinson v. State*, 28 Fla. 735, 9 So. 706; *Smith v. Irwin*, 51 N. J. L. 507, 18 Atl. 852; *Baltimore & R. Turnpk. R. Co. v. State use of Grimes*, 71 Md. 573, 18 Atl. 884.

66. Exception to charge.

An exception to the entire charge or to a series of propositions in it, in gross, does not require attention, if any portion of what is excepted to is sound.¹

¹*Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797; *Jones v. Osgood*, 6 N. Y. 233. For full treatment of this subject see *ante*, Division XI. *Exceptions*.

67. — to variance from request.

An exception does not require attention if it does not indicate the precise point of the supposed error, but leaves it to the judge to com-

pare the requests and the charge to ascertain what modifications are desired.¹

¹*Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 576, 7 Am. Rep. 489.

See also *ante*, Division XI. *Exceptions*.

68. When to be taken.

An exception to the charge must be taken before the jury have rendered their verdict. It must, at the time when taken, be reduced to writing by the exceptant or entered in the minutes.¹

¹N. Y. Code Civ. Proc. § 995; *Phelps v. Mayer*, 15 How. 160, 14 L. ed. 643.

It is a convenient practice to suggest to counsel that the taking of exceptions which do not involve requests for further instructions be postponed until the jury have gone out.

See also *ante*, Division XI. *Exceptions*.

E. SPECIAL VERDICT.

69. Right of jury to render special verdict.

Where the jury have a right to render a special verdict a refusal to instruct them that they have such right is error.¹

¹*Adams & Co.'s Exp. v. Pollock*, 12 Ohio St. 618.

By the New York statute the jury have this right in any action to recover a sum of money only, or real property, or a chattel. N. Y. Code Civ. Proc. § 1187.

In an action for the recovery of money only, it is, under Colo. Code, § 180, within the discretion of the jury to render a special or general verdict. *Thompson v. Gregor*, 11 Colo. 531, 19 Pac. 461.

Under the Iowa Code, § 2808, a jury in a civil case have a right to return a special verdict in their discretion. *Hall v. Carter*, 74 Iowa, 364, 37 N. W. 956.

It is not error, under Iowa Code, § 2807, to refuse to submit to the jury a question which calls for an answer as to an ultimate fact which would completely determine the case, as it is in the discretion of the jury whether the verdict should be general or special. *White v. Adams*, 77 Iowa, 295, 42 N. W. 199.

The jury may render a general or special verdict in their discretion in an action for the recovery of money only or specific real property under Cal. Code Civ. Proc. § 625. *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132.

The right to render a special verdict is not necessarily taken away by a statute allowing special questions to be put. *Hendrickson v. Walker*, 32 Mich. 68.

70. Power of judge to require it.

By the New York statute, in any other action than one for money only or real property or a chattel, except where one or more specific

questions of fact stated under the direction of the court are tried by a jury, the judge may direct the jury to find a special verdict upon any or all of the issues.¹

¹N. Y. Code Civ. Proc. § 1187.

The reference to "specific questions of fact," in the statute is to §§ 970, 971, of N. Y. Code Civ. Proc., providing for the trial by jury of questions of fact arising upon the issues.

A special verdict may be taken in a Federal court. *Daube v. Philadelphia & R. Coal & I. Co.* 46 U. S. App. 591, 77 Fed. Rep. 713, 23 C. C. A. 420.

A special verdict may be directed to determine a jurisdictional question depending on the plaintiff's incorporation and consequent citizenship. *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574, 3 L. R. A. 503.

Under the Ohio Code Civ. Proc. § 276, the power of the court to direct a special verdict is discretionary. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570, 586.

The jury may find a special verdict, but the court cannot direct or compel them to do so. *Peck v. Snyder*, 13 Mich. 21.

The trial judge may in an equity case, without a request from either party, require the jury to render a special verdict, under Ga. Civ. Code, § 4850, providing that "special verdicts may be found" in equity cases. *Hardin v. Foster*, 102 Ga. 180, 29 S. E. 174.

The supreme court in the District of Columbia may require the jury to render a special verdict in an action at law. *Baltimore & O. R. Co. v. Adams*, 10 App. D. C. 97.

The submission of special issues is within the discretion of the court under Tex. Rev. Stat. arts. 1327-1329. *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646.

The correct practice in rendering a special verdict "is that the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff; but if otherwise, then they find for defendant. By leave of the court such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing, as in case of a demurrer." *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756.

See also *Ross's Case*, 12 Ct. Cl. 565.

The power of the court to direct a special verdict is usually discretionary. *Worsham v. Vignal*, 14 Tex. Civ. App. 324, 37 S. W. 17.

A Federal court is not required to submit a special verdict as provided by the rules of practice in the state. *United States Mut. Acci. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

The court is not obliged in an ordinary damage suit to charge the jury that they may render a general or a special verdict, as the provisions of

Mont. Code Civ. Proc. § 275, are directory merely. *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

In an action for damages for tort, in Georgia, it is not the duty of the court to instruct the jury that they may return a special verdict, even though both justification and set-off be pleaded. *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839.

The court is bound, when asked, to direct a special verdict, but also has the discretion to order the finding of a general verdict. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483.

The submission to the jury of special interrogatories for a special verdict is a matter resting in the discretion of the trial court. *Omaha & N. Valley R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066.

The court may, at the request of a party after the jury have announced that they cannot agree on the verdict, submit special questions to them as the basis of a special verdict, without requiring them to render a general verdict, under Mansf. (Ark.) Dig. § 5142, in force in Indian territory, providing that in all actions the jury in their discretion may render a general or a special verdict, but may be required by the court in any case in which they render a general verdict to find specially upon questions of fact. *Williams v. Love* (Ind. Terr.) 43 S. W. 856.

71. When request should be made.

A demand for a special verdict is made too late after the testimony is closed and argument commenced,¹ and may properly be refused after a request to instruct the jury generally and the court has intimated the character of its instructions,² or after argument on instructions requested.³ But it is not erroneous if the court then require the jury to return a special verdict.⁴

It is not too late to ask for a special verdict at the close of the argument and before the charge to the jury.⁵

¹*United States Exp. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957 (citing Wis. Rev. Stat. § 2858).

²*Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428.

³*Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448 (citing Ind. Rev. Stat. 1881, § 546).

⁴*Lowman v. Sheets*, 124 Ind. 416, 7 L. R. A. 784, 24 N. E. 351.

⁵*Baltimore & O. R. Co. v. McCamey*, 12 Ohio C. C. 543 (citing Ohio Rev. Stat. § 5201).

72. General instructions.

The court is not bound to give any instructions as to the general rules of law governing the case where a special verdict is directed.¹ In such a case the instructions should be confined to the questions submitted.²

¹*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Cole v. Crawford*, 69 Tex. 124; *Louisville, N. A. & C. R. Co. v. Lynch*, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768.

²*Warden v. Reser*, 38 Kan. 86, 16 Pac. 60; *Coolican v. Milwaukee & S. Ste. M. Improv. Co.* 79 Wis. 471, 48 N. W. 717.

73. What questions may be asked:

Questions concerning physical facts put in issue by the pleadings may be submitted to the jury as part of the special verdict,¹ but uncontroverted questions of fact,² or those on which the evidence can be answered only in one way, need not be submitted.³ Interrogatories may be refused when not conclusive of the right of either party to a verdict,⁴ or when misleading,⁵ or in the alternative or disjunctive,⁶ or not based on the testimony,⁷ or if calling for a conclusion of law,⁸ or an evidentiary fact,⁹ or if dependent upon another question properly rejected,¹⁰ or if a judgment could not be rendered upon proper answers to them,¹¹ or when the questions in fact submitted cover the entire case.¹²

¹*Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714 (citing Wis. Stat. 1898, § 2858).

²*Heddles v. Chicago & N. W. R. Co.* 74 Wis. 239, 42 N. W. 237; *Schrubbe v. Connell*, 69 Wis. 476, 34 N. W. 503.

³*Stringham v. Cook*, 75 Wis. 589, 44 N. W. 777.

⁴*Kalbus v. Abbot*, 77 Wis. 621, 46 N. W. 810; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768.

⁵*Fromer v. Stanley*, 95 Wis. 56, 69 N. W. 820; *Rumph v. Hiott*, 35 S. C. 444, 15 S. E. 235; *Steinke v. Diamond Match Co.* 87 Wis. 477, 58 N. W. 842; *Rhyner v. Menasha*, 97 Wis. 523, 73 N. W. 41.

⁶*Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501 (that a question is in the alternative does not render it uncertain where the testimony proving one branch also proves the other).

A special interrogatory whether the defendant or his authorized agent ever made the alleged agreement is not objectionable on the ground that it is alternative. *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. 268.

⁷*Reed v. Madison*, 85 Wis. 667, 56 N. W. 185; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864.

⁸*Aurclius v. Lake Erie & W. R. Co.* 19 Ind. App. 584, 49 N. E. 857.

⁹*Slensby v. Milwaukee Street R. Co.* 95 Wis. 179, 70 N. W. 67.

¹⁰*Pier v. Chicago, M. & St. P. R. Co.* 94 Wis. 357, 68 N. W. 404.

¹¹*Texas & P. R. Co. v. Miller*, 79 Tex. 78, 11 L. R. A. 395, 15 S. W. 264.

¹²*Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 46 N. W. 1045; *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771.

74. Parties may draft the special verdict.

It is not the duty of the judge to prepare a draft special verdict to submit to the jury; but where a party has a right to require such a verdict the judge must, if requested in a proper case, give each party adequate opportunity to do so.¹

¹*Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 310, 10 Am. Rep. 111; *Hopkins v. Stanley*, 43 Ind. 553, 558 (so holding under a statute giving each party the right to demand a special verdict); s. p. *Miller v. Shackelford*, 4 Dana, 264, 271.

The degree of supervision which the court exercises over the form of a special verdict prepared by counsel is left largely to its discretion. *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370.

A submitted form of verdict is properly refused when not responsive to all the issues. *Brumback v. German Nat. Bank*, 46 Neb. 540, 65 N. W. 198.

Also, when the party submitting it does not request that a special verdict be submitted. *Louisville, N. A. & C. R. Co. v. Kane*, 120 Ind. 140, 22 N. E. 80.

Interrogatories prepared by parties to be propounded to the jury should be carefully inspected by the court, and those which it deems proper for submission should be rewritten and renumbered and submitted to the jury as coming from the court, counsel having the right to object to the refusal or modification of any interrogatories. *Kentland v. Hagan*, 17 Ind. App. 1, 46 N. E. 43.

Court has power to modify an interrogatory proposed for the jury, so as to simplify it without tending to confuse the jury, under Homer's (Ind.) Rev. Stat. § 546, providing that the special verdict shall be prepared by counsel on either side and submitted to the court, and be subject to change and modification by the court. *Hammond, W. & E. C. Electric R. Co. v. Spyzchalski*, 17 Ind. App. 7, 46 N. E. 47.

75. Right of jury to frame their own.

The jury to whom a draft special verdict is submitted may modify it or frame one themselves,¹ and should be instructed that they may do so.²

¹*Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 310, 10 Am. Rep. 111 (*dictum*); *Hopkins v. Stanley*, 43 Ind. 553, 558 (so held even under the Indiana statute, which gives each party the right to demand a special verdict).

²*Miller v. Shackelford*, 4 Dana, 264, 270. But if their finding is not sufficiently definite the court may require them to amend it. *Kansas P. R. Co. v. Pointer*, 14 Kan. 37, 51.

The court may properly direct the jury as to the form of their general verdict after they have found all the issuable facts. *Doran v. Ryan*, 81 Wis. 63, 51 N. W. 259.

76. Form of verdict.

A special verdict should set forth facts only as distinguished from evidence, immaterial circumstances, argumentative inferences, or conclusions of law. It should also set forth such documentary evidence as may be matter for judicial construction, and where the facts established are of the nature of circumstantial evidence the jury should find the ultimate fact which may be deduced from the circumstantial facts.¹

¹*Ross's Case*, 12 Ct. Cl. 565. Should determine the ultimate facts. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262.

The jury need not report the evidence by which they reached their conclusions. *Jackson v. German Ins. Co.* 27 Mo. App. 62; *McCoy v. Milwaukee Street R. Co.* 88 Wis. 56, 59 N. W. 453.

F. SPECIAL QUESTIONS.**77. Power to put special questions.**

The court has power, unless otherwise provided by statute, to require a jury on rendering a general verdict to find specially upon any questions of fact in the issues submitted to them.¹ So doing is in the discretion of the judge,² in respect to the number, form, character, and substance of the questions,³ unless made matter of right by the statute.⁴

¹*McMasters v. Westchester County Mut. Ins. Co.* 25 Wend. 279; *Dyer v. Greene*, 23 Me. 464; *Spaulding v. Robbins*, 42 Vt. 90-93; *Richardson v. Weare*, 62 N. H. 80.

Not error to do so against objection. *Barstow v. Sprague*, 40 N. H. 27, 33.

The court may direct the jury to find specially upon the corporate existence of the plaintiff in addition to their general verdict, under Cal. Code Civ. Proc. § 625. *Fresno Canal & Irrig. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

In a replevin suit continued as an action for the recovery of money only it is discretionary with the jury, under Civ. Code, § 181, whether they will make special findings. *Meyers v. Hart*, 3 Colo. App. 392, 33 Pac. 647.

The district court of Kansas may of its own motion submit special questions of fact to the jury in a case at law as well as in equity. *Mannen v. Stebbins*, 1 Kan. App. 261, 40 Pac. 1085; *Waggoner v. Oursler*, 54 Kan. 141, 37 Pac. 973.

The court may demand a special finding concerning any subject upon which it may properly instruct the jury. *Gourley v. St. Louis & S. F. R. Co.* 25 Mo. App. 144.

The jury can be instructed, under the Oklahoma Code of Civil Procedure, to make special findings only when they render a general verdict. *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641.

In an action to recover for services in procuring a purchaser for land the court may, under Wis. Rev. Stat. § 2558, submit the case for a general

verdict and for answers to special questions. *Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

Requested interrogatories are properly refused where the request is absolute and not qualified by the condition that they are to be answered in the event a general verdict is returned. *Sun Oil Co. v. Ohio Farmers' Ins. Co.* 15 Ohio C. C. 355.

Statutes requiring instructions to be in writing do not necessarily apply to a direction to find specially. *McCallister v. Mount*, 73 Ind. 569, 567.

*This is the rule under the New York Code of Civil Procedure, § 1187; also in California.

St. Louis & S. F. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 21 L. R. A. 566, 41 Pac. 499; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968 (citing Cabbey's Consol. Stat. 1893, § 4813); *Floaten v. Ferrell*, 24 Neb. 347, 38 N. W. 732 (Neb. Code, § 293); *Davis v. Guardian Assur. Co.* 87 Hun. 414, 34 N. Y. Supp. 334 (N. Y. Code Civ. Proc. 1187); *Wild v. Oregon Short Line & U. N. R. Co.* 21 Or. 159, 27 Pac. 954; *Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 639, 57 N. W. 919 (Comp. Laws, § 5061); *Columbia & S. R. Co. v. Hawthorne*, 3 Wash. Terr. 353, 19 Pac. 25; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518 (under Wash. Code); *Pencil v. Home Ins. Co.* 3 Wash. 485, 28 Pac. 1031 (Code, § 242); *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493 (2 Comp. Laws, § 6026); *McGrath v. Bloomer*, 73 Wis. 29, 40 N. W. 585; *McDougall v. Ashland Sulphite-Fire Co.* 97 Wis. 382, 73 N. W. 327 (Sanb. & Ann. Stat. § 2858).

A Federal court is not bound to direct special findings by a clause in a state code in regard to the duties of courts. *Dwyer v. St. Louis & S. F. R. Co.* 52 Fed. Rep. 87.

It is the duty of the court, under the Kansas statutes, upon request of either party, to require the jury to make special findings of material facts. *Bickford v. Champlin*, 3 Kan. App. 681, 44 Pac. 901.

The court may, in its discretion, under Utah Comp. Laws 1888, § 3374, refuse to direct the jury to make special findings in an action for personal injuries. *Mangum v. Bullion, B. & C. Min. Co.* 15 Utah, 534, 50 Pac. 834.

It is optional with the court to submit or refuse particular questions of fact to the jury, under Cal. Code Civ. Proc. § 625, in an action for the recovery of money only. *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.

It is discretionary with the trial court, in an action for negligently causing the death of plaintiff's intestate, to instruct the jury to make special findings of questions of fact, under 2 Utah Comp. Laws 1888, § 3374. *Webb v. Denver & R. G. W. R. Co.* 7 Utah, 17, 24 Pac. 616.

The court may, in its discretion, submit special findings in addition to those which the parties had requested. *Norton v. Volzke*, 158 Ill. 402, 41 N. E. 1085.

**Hackford v. New York C. & H. R. R. Co.* 53 N. Y. 654; *Forrest v. Forrest*, 6

Duer, 102, s. c. 3 Abb. Pr. 144; *American Co. v. Bradford*, 27 Cal. 365. Under this statute the judge cannot require it except in connection with a general verdict. *La Grange County Comrs. v. Kromer*, 8 Ind. 446, 449 (under statute making questions a matter of right.)

Allen v. Davison, 16 Ind. 416; *Jacksonville S. E. R. Co. v. Southworth*, 32 Ill. App. 307, Affirmed in 135 Ill. 250, 25 N. E. 1093; *Chicago & N. W. R. Co. v. Bouck*, 33 Ill. App. 123; *Toledo, St. L. & K. C. R. Co. v. Kid*, 29 Ill. App. 353; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307.

*A state statute making it matter of right does not apply in the courts of the United States. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898.

78. When to be put.

In the absence of special provision, the court may fix the time for submitting special questions,¹ and may refuse to receive them if unseasonably put.²

¹Even where, as in Indiana, the putting of such questions is matter of right. *Malady v. McEnary*, 30 Ind. 273, 277.

²*Malady v. McEnary*, 30 Ind. 273 (holding refusal to receive during charge not error); *Burleson v. Burleson*, 28 Tex. 383, 411 (holding refusal to receive further question after jury had returned with their verdict not error); *Lambert v. McFarland*, 7 Nev. 159 (holding refusal to put questions first offered after jury were ready with verdict not error).

A request for a special finding made after the evidence has been partly heard is too late, under Ind. Rev. Stat. 1881, § 551. *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

Must be presented at least before the commencement of the argument of counsel to the jury, otherwise they cannot be submitted at all. *Caledonian F. Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

Not too late when presented after the evidence is given and before the argument is commenced. *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695.

Interrogatories tendered after the beginning of the argument are properly refused. *Hamline v. Engle*, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463; *Cleveland Stone Co. v. Monroe County Oolitic Stone Co.* 11 Ind. App. 423, 39 N. E. 172.

Must be submitted, under Ill. Rev. Stat. 1889, chap. 110, § 58a, before the commencement of the argument to the jury, whether the opening and closing arguments for plaintiff are made by the same or different counsel. *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027.

A question as to the plaintiff's corporate existence may be submitted after argument and the giving of instructions. *Fresno Canal & Irrig. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

A defendant who has asked for direction of a verdict can have specific questions of fact submitted only by requesting such submission before the case is finally disposed of by the direction of a verdict for plaintiff. *Robbins v. Springfield F. & M. Ins. Co.* 79 Hun, 117, 29 N. Y. Supp. 513.

That special interrogatories propounded to the jury were sealed in an envelope, and thus delivered to the jury with an instruction not to open the envelope until they had agreed upon a general verdict, is not available error, as the statute provides that interrogatories are only to be answered after a general verdict has been agreed to. *Summers v. Tarney*, 123 Ind. 560, 24 N. E. 678.

79. Nature and form of questions.

The judge should not put to the jury an immaterial question,¹ or one not based on the evidence,² or which calls for evidence,³ or a conclusion of law,⁴ or one an answer to which, if contrary to the general verdict, would not control the same and be conclusive of the issue,⁵ nor should a question leading in form be submitted.⁶

Questions are properly refused when embraced in interrogatories previously submitted,⁷ or pertaining to matters not controverted.⁸ All material issues necessarily determined by the jury in arriving at their verdict should be submitted,⁹ but the submission need not cover all the issues,¹⁰ nor those involved in the general verdict,¹¹ nor need every detail of the case be made a distinct issue.¹² It rests largely in the sound discretion of the trial court as to how generally or how particularly the question of fact submitted shall be stated.¹³

¹*Hanewacker v. Ferman*, 47 Ill. App. 17; *Maxwell v. Boyne*, 36 Ind. 120; *Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611; *Aurelius v. Lake Erie & W. R. Co.* 19 Ind. App. 584, 49 N. E. 857; *Hatfield v. Lockwood*, 18 Iowa, 296; *Weir v. Herbert*, 6 Kan. App. 596, 51 Pac. 582; *Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235; *Crane v. Reeder*, 25 Mich. 303; *Sun Oil Co. v. Ohio Farmers' Ins. Co.* 15 Ohio C. C. 355; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584.

Interrogatories which ask for a material fact to be determined may be submitted to the jury, although not calling for the determination of an ultimate fact. *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717.

²*Leroy & W. R. Co. v. Anderson*, 41 Kan. 528, 21 Pac. 588; *Caledonian F. Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

The court may revise and modify interrogatories offered by the parties, to correspond with the facts involved. *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502; *Terre Haute & I. R. Co. v. Voelker*, 31 Ill. App. 314.

³*Lake Erie & W. R. Co. v. Morain*, 140 Ill. 117, 29 N. E. 869; *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257; *Huntington County Comrs. v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864; *Hatfield v. Lockwood*, 18 Iowa, 296; *Aultman & T. Co. v. Shelton*, 90 Iowa, 288, 57 N. W. 857; *Runkle v. Hartford Ins. Co.* 99 Iowa, 414, 68 N. W. 712; *Adams v. Louisville & N. R. Co.* 6 Ky. L. Rep. 687.

'Chicago & E. I. R. Co. v. Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110.

An interrogatory whether there was any consideration for the note sued on is not objectionable on the ground that it calls for a legal conclusion, where the jury has been charged that if goods sold were utterly worthless when delivered there was a failure of consideration for the note given for the purchase price. *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 288, 43 N. W. 193.

'Firemen's Ins. Co. v. Appleton Paper & P. Co. 161 Ill. 9, 43 N. E. 713; *Chicago & A. R. Co. v. Reilly*, 75 Ill. App. 125; *Falkenau v. Abrahamson*, 66 Ill. App. 352; *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Van Horn v. Overman*, 75 Iowa, 421, 39 N. W. 679; *Whalen v. Chicago, R. I. & P. R. Co.* 75 Iowa, 563, 39 N. W. 894; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *Hemenway v. Burnham*, 90 Mich. 227, 51 N. W. 276; *First Nat. Bank v. Miltonberger*, 33 Neb. 847, 51 N. W. 232; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493; *Isley v. Wilson*, 42 W. Va. 757, 26 S. E. 551.

'Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; *Atchison, T. & S. F. R. Co. v. Butler*, 56 Kan. 433, 43 Pac. 767; *Benton v. St. Louis & S. F. R. Co.* 25 Mo. App. 155; *Anderson v. McPike*, 41 Mo. App. 328.

Special interrogatories are not improperly leading and suggestive merely because their form indicates to the jury how to find in order to authorize a judgment for one party or the other. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Rice v. Rice*, 6 Ind. 101.

'Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831; *Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Atchison, T. & S. F. R. Co. v. Hamilton*, 6 Kan. App. 447, 50 Pac. 102.

'Powell v. Chittick, 89 Iowa, 513, 56 N. W. 652.

'Read v. State Ins. Co. 103 Iowa, 307, 72 N. W. 665; *Rouse v. Osborne*, 3 Kan. App. 139, 42 Pac. 843.

'Carroll v. Chicago, B. & N. R. Co. 99 Wis. 399, 75 N. W. 176.

'McCullough v. Martin (Ind. App.) 35 N. E. 719; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *O'Leary v. German American Ins. Co.* 100 Iowa, 390, 69 N. W. 686.

'McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516.

'Southern K. R. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45.

Each interrogatory should be so formed as to present distinctly a single material fact. *Atchison, T. & S. F. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83; *L. Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, 26 L. R. A. 229, 38 N. E. 694.

A question should be refused unless it calls for a direct answer. *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464. Or if too general. *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Whalen v. Chicago, R. I. & P. R. Co.* 75 Iowa, 563, 39 N. W. 894.

But it is not error to refuse to put as a question whether there are any allegations in the complaint which are not true, and if so, what. *Morse v. Morse*, 25 Ind. 156.

80. Inspection and objection.

The court has power to require each party to submit his proposed questions to the other.¹ Objection to a question is too late after it has been answered.²

¹This point seems to have been involved in *Malady v. McEnary*, 30 Ind. 273, 277, and it is the better opinion that a party has a right to see the questions proposed by his adversary, at any rate unless they are excluded by the judge.

The court may properly refuse to submit special interrogatories to the jury where they have not been submitted to counsel on the other side as required by Iowa Code, § 2808. *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984.

Also, when not shown to the opposing counsel until after the beginning of the argument. *McMahon v. Sankey*, 35 Ill. App. 341.

The requirement of Iowa Code, § 2808, that questions be submitted to the attorneys of the adverse party, is limited to questions requested by the parties, and does not extend to those submitted on the court's own motion. *Clark v. Ralls*, 71 Iowa, 189, 32 N. W. 327.

It is only when one of the parties requests the court to submit special interrogatories to the jury under the Illinois statute that the opposite party is entitled to examine them before the commencement of the argument. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

In a chancery case brought to contest the probate of a will special interrogatories requiring findings whether the instrument is the will of the testator, whether he was of sound mind and memory, and whether he was unduly influenced, are not within the Illinois statute requiring special interrogatories to be submitted to the adverse party before argument. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

Pertinent questions of fact stated in writing and handed to the court at the close of the testimony must be submitted to the jury, although the attention of the other counsel was not called to them until after his opening argument. *Topeka v. Boutwell*, 53 Kan. 20, 27 L. R. A. 593, 35 Pac. 819.

²*Brooker v. Weber*, 41 Ind. 426.

81. Withdrawing.

Where the power of the judge to put special questions is discretionary, he may, in his discretion, withdraw them before they have been answered.¹ Where it is matter of right he cannot withdraw a proper question against objection of the party at whose instance it was regularly put.²

The jury at the request of either party should be required to give full and responsive answers to the particular questions of fact put to them.³ It is error for the court to direct the jury what answers they shall make if they find the general verdict in a certain way.⁴

¹*Taylor v. Kitchum*, 5 Robt. 507; *Moss v. Priest*, 19 Abb. Pr. 314, 316 (dictum); *National Refining Co. v. Miller*, 1 S. D. 548, 47 N. W. 962.

²*Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329.

Material questions offered and submitted after argument and the giving of instructions cannot be withdrawn from the jury against the objection of the party who offered them as having been offered too late, where the jury have been deliberating upon them for some time. *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 500, 14 S. E. 261.

Interrogatories to the jury cannot be withdrawn by the proposing party after the return of a general verdict, but the other party may insist that the court shall require an answer to them. *Duesterberg v. State ex rel. Vincennes*, 116 Ind. 144, 17 N. E. 624.

³*McPheeters v. Birk*, 48 Kan. 784, 30 Pac. 127; *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Jordan v. Johnston*, 1 Kan. App. 656, 42 Pac. 415; *Cleveland, C. C. & St. L. R. Co. v. Doerr*, 41 Ill. App. 530; *American Cent. Ins. Co. v. Hathaway*, 43 Kan. 399, 23 Pac. 428.

The court's refusal to compel the jury to answer special questions is in effect a withdrawal of them and the same as though the court had refused to submit them in the first instance. *Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235.

Special questions cannot be withdrawn because the jury are unable to agree as to the answers thereto, and a general verdict be accepted, where the right to recover depends upon the answers to such questions. *Ermentraut v. Providence-Washington Ins. Co.* 67 Minn. 451, 70 N. W. 572; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539.

It is erroneous to instruct the jury that they are not obliged to answer absolutely, or if there is a want of evidence. *Crane v. Reeder*, 25 Mich. 303 (Cooley, J.).

The jury must answer if there is evidence on the subject. *Maxwell v. Boyne*, 36 Ind. 120. But there is a dictum that where there is no evidence the jury may say they cannot answer.

A refusal to require the jury to give a more definite answer to an interrogatory is proper where that interrogatory is fully covered by answers to other interrogatories. *Louisville, N. A. & C. R. Co. v. Kane*, 120 Ind. 140, 22 N. E. 80.

A finding of the jury, in answer to an interrogatory whether plaintiff received anything for securities surrendered, simply that plaintiff did receive something, warrants a further interrogatory as to the value of what he received. *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558.

The jury may properly be instructed that they may give their recollection of the facts proved in answering the interrogatory. *Heiney v. Garretson*, 1 Ind. App. 548, 27 N. E. 989.

An interrogatory to the jury answerable only by men skilled in the science to which it pertains is properly withdrawn. *Continental L. Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220.

⁴*Beecher v. Galvin*, 71 Mich. 391, 39 N. W. 469 (citing the Mich. statute).

But counsel in his argument may state that the general and special verdict should be consistent and what the findings should be to support a general verdict. *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652.

It is error for the court to tell the jury that they need not answer certain questions in relation to the purchase and destruction of disputed articles claimed under a mortgage if they find that no property was taken that was not covered by the mortgage. *International Wrecking & Transp. Co. v. McMorran*, 73 Mich. 467, 41 N. W. 510.

The court may instruct the jury that if they answer an intermediate question of the series in a special verdict in a certain way they need not consider the subsequent questions,—especially when cautioned to answer the questions according to the evidence, regardless of the result. *Chopin v. Badger Paper Co.* 83 Wis. 192, 53 N. W. 452.

See also *post*, Division XXV. §§ 12 *et seq.*, and Division XXIV. § 6.

G. SEALED VERDICT.

82. Power of the court.

The judge may, in his discretion, upon consent of the parties, or if no objection be made authorize the jury to, bring in a sealed verdict.¹

¹*Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *High v. Johnson*, 28 Wis. 72; *Parmlee v. Sloan*, 37 Ind. 469; *Warner v. New York C. R. Co.* 52 N. Y. 437, 440, 11 Am. Rep. 724; *Mt. Vernon v. Cockrum*, 59 Ill. App. 540 (sealed verdict may be directed in the discretion of the court).

Lucas v. Marine, 40 Ind. 289 (judge properly sent direction from hotel in the absence of counsel).

The court may authorize a sealed verdict without regard to the consent or objections of the parties. *Bunker Hill & S. Min. & C. Co. v. Schmeling*, 48 U. S. App. 331, 79 Fed. Rep. 263, 24 C. C. A. 564.

Green v. Bliss, 12 How. Pr. 428 (may, without consent).

An instruction to the jury that they may seal up their verdict if they agree not erroneous, where no objection was made thereto, and the fact of disputation is not shown. *Bosley v. Farquar*, 2 Blackf. 61.

Nor would separation appear to vitiate the verdict in the absence of a suggestion that the jury were improperly practised upon. *Harter v. Seaman*, 3 Blackf. 27; *Evans v. Foss*, 49 N. H. 490.

This is true although they were not admonished not to converse with any one concerning the trial. *Crocker v. Hoffman*, 48 Ind. 207.

An instruction to the jury that they may seal up their verdict if they agree before the incoming of the court in the morning, and they will be discharged until court convenes, but that if they do not agree they will not be allowed to go, is not objectionable as a statement that they will be kept indefinitely unless they agree. *Knapp v. Chicago & W. M. R. Co.* 114 Mich. 199, 72 N. W. 200.

XXII.—DOCUMENTS FOR THE JURY.

1. General rule as to documents in evidence.
2. — used, but not in evidence.
3. Several documents.

1. General rule as to documents in evidence.

In the absence of a statute to the contrary,¹ the judge may in his discretion allow documents (except in most of the states depositions),² which have been admitted in evidence to be taken by the jury when retiring to deliberate upon their verdict,³ unless objected to because written upon or underscored to call attention to special portions of them.⁴

¹In *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286, it was held not error for the United States court to refuse to follow a state statute allowing the jury to take out documentary evidence other than depositions.

Statutes which in general provide that all papers received in evidence, except depositions, may be taken by the jury when retiring to deliberate upon their verdict, exist in Alabama (Code 1896, § 3329), California (Code Civ. Proc. § 612), Colorado (Code Civ. Proc. § 169), Delaware (Rev. Code 1893, chap. 106, § 26), Idaho (Rev. Stat. 1887, chap. 4388), Illinois (Starr & C. Rev. Stat. 1896, chap. 110, § 56), Iowa (Rev. Code 1897, § 3717), Minnesota (Gen. Stat. 1894, § 5375), Mississippi (Ann. Code 1892, § 730), Montana (Code Civ. Proc. 1895, § 1083), Nevada (Gen. Stat. 1885, § 3191), New Jersey (Rev. Stat. 1896, p. 2563, § 182), North Dakota (Rev. Codes, § 5436), Oregon (1 Hill's Anno. Laws 1892, p. 301, § 204), South Dakota (Dak. Comp. Laws 1887, § 5052), Utah (Rev. Stat. 1898, § 488), Virginia (Code 1898, § 3388), Washington (Code Civ. Proc. 1897, § 5004), and West Virginia (Code 1891, chap. 131, § 12).

Depositions may be taken out in Alabama and West Virginia, however, and in Iowa a deposition may be taken out if all the evidence is in writing and no part of the deposition has been excluded: but in Virginia, Mississippi, and New Jersey the statute is silent as to depositions.

Accounts and account books are excepted in Colorado.

Copies of such papers or of parts of such public documents given in evi-

dence as ought not, in the opinion of the court, to be taken from the person having them in possession may be taken out in California, Colorado, North Dakota, South Dakota, Idaho, Minnesota, Montana, Oregon, and Washington.

Notes of the testimony taken by the jurors or any of them may be taken out by the jury in California, Colorado, North Dakota, South Dakota, Idaho, Montana, Minnesota, Oregon, and Utah, but none taken by any other person.

Written instructions to the jury may be taken out in Alabama (Code 1896, § 3228), Illinois, Missouri (Rev. Stat. 1839, § 2188), Ohio (Bates's Ann. Stat. 1898, §§ 5190-5197), North Carolina (Acts 1885, chap. 137), North Dakota (Rev. Codes 1895, § 5433), South Dakota (Dak. Comp. Laws 1887, § 5049), Texas, and Utah, and this provision is generally held to be mandatory. *Miller v. Hampton*, 37 Ala. 342; *State v. Thompson*, 83 Mo. 257; *Caldwell v. Brown*, 9 Ohio C. C. 691. The Alabama statute on this point requires and allows no charges to go to the jury except those marked "given." *Washington v. State*, 106 Ala. 58, 17 So. 546.

In Maine (Rev. Stat. 1883, chap. 82, § 90), it is provided that if either party purposely introduces an improper paper (one which has some connection with the cause, but is not in evidence) among those given to the jury when they retire, the court may set aside the verdict on motion of the adverse party.

In general it seems that these statutes are directory merely, and that it would not be error for the court in its discretion to refuse to allow the jury to take out any papers. See *People v. Cochran*, 61 Cal. 548, where that view is taken of the California statute.

*Depositions are commonly excepted from the general rule (see note 1, *supra*). *Whitehead v. Keyes*, 3 Allen, 495. The reason is that the testimony which they contain if read and reread by the jury would otherwise have an unfair advantage over the oral testimony by speaking to the jury more than once. Where all the evidence is in writing this is no objection. *Thomp. & M. Juries*, § 385 (1, 2), and cases cited. *Shomo v. Zeigler*, 10 Phila. 611; *Hairgrove v. Millington*, 8 Kan. 480.

Papers attached to and made a part of a deposition cannot be detached and sent to the jury over objection. *Chamberlain v. Pybas*, 81 Tex. 511, 17 S. W. 50; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Oskaloosa College v. Western Union Fuel Co.* 90 Iowa, 380, 54 N. W. 152, 57 N. W. 903. But it is error to refuse to permit the jury to take into the jury room an exhibit admitted as independent evidence, notwithstanding its connection with a deposition. *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075. And it is not error to permit the jury to take out, for the purpose of definitely fixing their verdict, exhibits which have become detached from a deposition, where the facts contained in them are conclusively established by the evidence. *Texas & P. R. Co. v. Robertson* (Tex. Civ. App.) 35 S. W. 505.

In malicious prosecution, the affidavit of the defendant made before the magistrate in instituting the prosecution is not a deposition within the exception. *Seibert v. Price*, 5 Watts & S. 438, 40 Am. Dec. 525.

Nor do promissory notes in evidence not so attached to a deposition as not to be removable therefrom constitute a part of the deposition, although it proves certain matters concerning them. *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

In New York, and it seems in Ohio and Kentucky, it is within the discretion of the court to permit the jury to take out a deposition even where the testimony is partly oral. *Howland v. Willetts*, 9 N. Y. 170; *Stites v. McKibben*, 2 Ohio St. 588; *Newport News & M. Valley Co. v. Mendell*, 17 Ky. L. Rep. 1400, 34 S. W. 1081.

**Howland v. Willetts*, 9 N. Y. 170; *Thomp. & M. Juries*, § 383 (1) and cases cited; *Davis v. State*, 91 Ga. 167, 17 S. E. 292; *Wood v. Wood*, 47 Kan. 617, 28 Pac. 709; *Baltimore & O. R. Co. v. McCamey*, 12 Ohio C. C. 543; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *Burghardt v. Van Deusen*, 4 Allen, 374; *Hanger v. Imboden*, 12 Mo. 85; *Tabor v. Judd*, 62 N. H. 288; *Hickman v. Layne*, 47 Neb. 177, 66 N. W. 298; *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646, 48 N. W. 296 (laying down the rule that where exhibits have been fully proved and admitted in evidence and their authenticity is unquestioned and there is no testimony to impeach their contents it is within the discretion of the trial court to allow them to be taken to the jury room over objection). *Contra*, *Nichols v. State ex rel. Clark*, 65 Ind. 512; *Lotz v. Briggs*, 50 Ind. 346; *Toohy v. Sarvis*, 78 Ind. 474; *Williams v. Thomas*, 78 N. C. 47. And see *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117, in which it is held that a party cannot claim as a matter of legal right that the jury be allowed to take out a paper in evidence, though the court may permit it upon consent of both parties.

The rule extends to tangible objects. Thus, a model used as evidence may be taken out by the jury. *Louisville & N. R. Co. v. Berry*, 96 Ky. 604, 29 S. W. 449. And they may take with them a piece of a broken column used without objection at the trial upon the issue of strength (*Linch v. Paris Lumber & G. Elevator Co.* 80 Tex. 23, 15 S. W. 208), or a model used by witnesses to explain their testimony and admitted only for that purpose (*Illinois Silver Min. & Mill. Co. v. Raff*, 7 N. M. 336, 34 Pac. 544), or a model so used and not formally introduced in evidence. *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947.

Papers proper for the jury to have may be sent out after they have retired for deliberation. *Kline v. First Nat. Bank (Pa.)* 15 Atl. 433; *Smith v. Holcomb*, 99 Mass. 552.

Where the genuineness of a document in evidence is disputed it has been held error to allow it to be taken out by the jury to compare the handwriting of the body of it with that of the signature. *Re Foster*, 34 Mich. 21; *Chance v. Indianapolis & W. Gravel Road Co.* 32 Ind. 472. Compare, however, *State v. Scott*, 45 Mo. 302, *contra*. Papers admitted in evidence for other purposes may be taken to the jury room, it seems, to test handwriting by comparison. *Hardy v. Norton*, 66 Barb. 527. But see *Howell v. Hartford F. Ins. Co.* 6 Biss. 163, Fed. Cas. No. 6,779, where reasons are given why the comparison should be made only in open court and holding that it is no ground for a new trial to refuse to permit the jury to take out papers for that purpose. In *Means v. Means*, 7 Rich. L. 533, it is held to be a matter within the discretion

of the court. A document used for comparison by consent was held not a paper "read in evidence" within the meaning of a statute of Illinois allowing such papers to go to the jury room, in *Cox v. Straisser*, 62 Ill. 383.

As judicial records put in evidence must be complete, and as documents offered in evidence must generally go in as a whole, they may be taken to the jury room although they contain irrelevant matter, or even contain depositions pertinent to the proceeding wherein taken, but immaterial to the issue, on which the jury are to find. *Shomo v. Zeigler*, 10 Phila. 611. So in *O'Neill v. Calhoun*, 67 Ill. 219, where the record of a former suit was read in evidence by consent, it was held no error to allow it to be taken out by the jury, since it was not a deposition read without consent, nor was it excluded by the Illinois statute. But in *Lotz v. Briggs*, 50 Ind. 346, 348, it was held error to allow a record of a former suit, admitted in evidence, to be taken out by the jury. Thus applying the rule in that state which excludes all documents from the jury room (see above).

¹Thomp. & M. Juries, § 383 (5); *Watson v. Walker*, 23 N. H. 472, 497.

2. — used, but not in evidence.

The judge may also allow documents forming part of the record or properly used before the jury on the trial—such as the writ or process and the pleadings,¹ and bills of particulars,² and the judge's written instructions³—to be taken out, provided the jury understand that they are not evidence.⁴

Other papers must not be taken out.⁵

¹Thomp. & M. Juries, § 387, and cases cited.

It is not error to allow the jury to take the pleadings with them to the jury room (*Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Dorr v. Simerson*, 73 Iowa, 89, 34 N. W. 752; *East Dubuque v. Burhyte*, 173 Ill. 558, 50 N. E. 1077), where the construction of the pleadings and the determination as to what are the issues are not left to the jury. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40. But a pleading which has been withdrawn should not be sent out although such a course will not require a reversal where the withdrawn pleading is in substance the same as the one on which the cause was tried. *Hall v. Rupley*, 10 Pa. 231.

The South Dakota Statute (see § 1, note 1, *supra*) does not contemplate that the jury shall be permitted to take the pleadings with them upon retiring. *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755. And under the Colorado statute the pleadings cannot be taken out by the jury in order that they may determine what matters are admitted and what not (*Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486), and the practice is generally not sanctioned in that state. *Good v. Martin*, 1 Colo. 169, 91 Am. Dec. 706.

That a verdict on a former trial was indorsed upon or attached to the pleadings does not seem to be material (*St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571), where it was not read by the jury

until after their verdict was agreed upon. *Georgia P. R. Co. v. Dooley*, 86 Ga. 294, 12 L. R. A. 342, 12 S. E. 923. Nor does the fact that a writ was inadvertently permitted to go to the jury without erasing or covering up the indorsement of a memorandum of the amount of the judgment on a former trial require reversal. *Clapp v. Clapp*, 137 Mass. 183. And that the verdict on a former trial accidentally falls into the hands of the jury with the other papers is not ground for exception. *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255, 34 N. E. 646; *Harriman v. Wilkins*, 20 Me. 93.

²*Rich v. Flanders*, 39 N. H. 304.

³*Thomp. & M. Juries*, § 388 (citing *Hurley v. State*, 29 Ark. 17, 29; *Stete v. Tompkins*, 71 Mo. 613; *Wood v. Aldrich*, 25 Wis. 695); *Head v. Langworthy*, 15 Iowa, 235; *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481. And see § 1, note 1, *supra*. Contra, *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 61, 34 N. W. 659. Nor is it material that the instruction is a requested one which the judge marked "refused." *Langworthy v. Connelly*, 14 Neb. 340, 15 N. W. 737. But it is error to permit the jury to take out a charge indorsed "refused" where a part of it contains matter which the jury might properly consider. *Trinity County Lumber Co. v. Denham*, 85 Tex. 56, 19 S. W. 1012.

The practice was disapproved in *Smith v. Lownsdale*, 6 Or. 79, but was not held reversible error, as the law of the case was clearly and correctly stated. So, in Georgia, it has been regarded as an unsafe practice because of the danger of a part, and not the whole, being read by the jury, and it was held error for the judge to permit the jury to take his written charge to the jury room against the objection of counsel. *Gholston v. Gholston*, 31 Ga. 625. But see *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216, in which sending the written charge of the court out with the jury after it had been read to them was held to be at most only an irregularity which was waived by a failure to object at the time.

In Alabama, the statute providing that written instructions shall "become part of the record and may be taken" out by the jury (see § 1, note 1, *supra*) is held to be mandatory and that it is error to refuse to allow the jury to take them to the jury room when requested by counsel. *Miller v. Hampton*, 37 Ala. 342. Under a statute providing that all charges shall be given in writing, if requested, and that all written instructions and charges shall be taken out by the jury, written instructions given at the request of the parties may be so taken out, although the general charge is given orally. *Foy v. Toledo Consol. Street R. Co.* 10 Ohio C. C. 151.

Written instructions given to the jury at the trial cannot be sent to the jury after they have retired, without consent of the parties. *Smith v. McMillen*, 19 Ind. 391.

⁴*Thomp. & M. Juries*, § 386 (2); *O'Hara v. Richardson*, 46 Pa. 385, 389.

⁵*Thomp. & M. Juries*, § 386 (1), and cases cited; *Nolan v. Vosburg*, 3 Ill. App. 596; *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398. To the same effect are *Carlin v. Chicago, R. I. & P. R. Co.* 31 Iowa, 370 (an erroneous instruction taken out); *Durfee v. Eveland*, 8 Barb. 46 (con-

sel's minutes of testimony); *O'Brien v. Merchants' F. Ins. Co.* 6 Jones & S. 482 (a prejudicial paper inadvertently left in an account book taken out. Judgment reversed); *Mitchell v. Carter*, 14 Hun, 448 (judge's minutes of testimony); *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857 (memorandum improperly used to refresh recollection); *McLeod v. Humeston & S. R. Co.* 71 Iowa, 138, 32 N. W. 246 (evidence taken at corner's inquest inadvertently given to the jury with the other papers.)

An entire document should not be permitted to go to the jury with no safeguard against the examination or consideration of those portions not in evidence. *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075. An instruction not to examine any portion of the document except what was put in evidence is not sufficient. *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327. Contra, *Boyer v. Shenandoah*, 16 Pa. Co. Ct. 75.

In an action to recover the balance struck on an account rendered it is error to allow the jury to take out the account itself which was incompetent evidence and contested. *Watson v. Davis*, 52 N. C. (7 Jones, L.) 178. And admitting in the pleadings the execution of a note in suit does not authorize the court to allow the jury to take it to their room unless it has been introduced in evidence. But since the jury may take out the pleadings, the examination of the original instrument instead of the copy contained in the pleadings is not prejudicial to either party. *State Bank v. Brewer*, 100 Iowa, 576, 69 N. W. 1011. And that the jury took out without the administrator's consent the written claim against the estate sued on, if an irregularity, will not require a reversal of the judgment. *Avery v. Moore*, 133 Ill. 74, 24 N. E. 606.

As to computations to aid the jury in estimating the amount due the plaintiff the cases are conflicting. In *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, it is said to be the practice in Michigan to allow the jury to take such a computation made by the plaintiff's attorney to the jury room, provided they understand that it is not evidence. But this case was qualified in *Harroun v. Chicago & W. M. R. Co.* 68 Mich. 208, 35 N. W. 914, in which the rule is laid down that memoranda or statements made by counsel cannot be taken out by the jury over objection except in cases involving the investigation of long accounts. In *Rorer v. Rorer*, 48 N. J. L. 51, 3 Atl. 67, the court, following *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, approved the action of the trial judge in permitting the jury to take out a long itemized account used by counsel in the course of the trial but not offered in evidence, proof as to the items of the account having been given and the court having instructed the jury not to use it as evidence except for the purpose of aiding the memory. It seems to be proper in Pennsylvania to permit statements of claim to go to the jury. *Allen v. Philadelphia*, 1 Pa. Dist. R. 216; *Ege v. Kille*, 84 Pa. 333; *Ott v. Oyer*, 106 Pa. 7. But it is error to permit a statement to be taken out which contains one claim which cannot be recovered in the action and another, the amount of which is entirely a matter of dispute. *Himes v. Kiehl*, 154 Pa. 190, 25 Atl. 632. The practice was disapproved in *Hatfield v. Cheaney*, 76 Ill. 488, where a witness made a computation of the amount due upon a note,

and made a memorandum of the result upon the note itself, which was permitted to go to the jury. The practice is also disapproved in *Alexander v. Dunn*, 5 Ind. 122. And in *Burton v. Wilkes*, 66 N. C. 604, it was held error for the judge to hand to the jury an abbreviated estimate of plaintiff's claim for damages, against the wish of the opposite party. See also *Drew v. Andrews*, 8 Hun, 23, where it was held error for the court to direct the jury to take out the pleadings and from them fix the amount due the plaintiff after having already found for the plaintiff without fixing any amount.

Law books should not be taken out by the jury. *Harrison v. Hance* 37 Mo. 185; *Merrill v. Nary*, 10 Allen, 416 (a well-considered case); *State v. Smith*, 6 R. I. 33; *Newkirk v. State*, 27 Ind. 1; *State v. Kimball*, 50 Me. 409, 418 (where it was held no error to refuse to allow the jury to take out the Revised Statutes). Contra, *Loew v. State*, 60 Wis. 559, 19 N. W. 437. Even where both parties consent. *Burrows v. Unwin*, 3 Car. & P. 310. Nor scientific books, nor maps. *Thomp. & M. Juries*, § 392, citing *State v. Gillick*, 10 Iowa, 98, and *State v. Hartmann*, 46 Wis. 248, 50 N. W. 193. See also *State v. Lantz*, 23 Kan. 728. But it is not error for the jury to use a dictionary to ascertain the meaning of a word employed by them in a special verdict. *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496. And in *United States v. Horn*, 5 Blatchf. 105, Fed. Cas. No. 15,389, the use of the city directories by the jury in their room was held insufficient ground for a new trial.

As the judge's minutes of the testimony are usually imperfect and are likely to have marginal notes, underscorings, and the minutes written upon them, it is obvious that they should never go to the jury, and if the jury obtain them even accidentally it is ground for a new trial. *Neil v. Abel*, 24 Wend. 185; *Mitchell v. Carter*, 14 Hun, 448.

It is also erroneous for the minutes of counsel to go to the jury, and a new trial will be granted unless it affirmatively appears that the losing party could not have been prejudiced thereby. *Durfee v. Eveland*, 8 Barb. 46.

As to juror's minutes of the testimony it is provided by statute in some states (see § 1, note 1, *supra*), that they may be taken to the jury room, but in the absence of a statute it has been held in Indiana that, as jurors would be too apt to rely on what might be imperfectly written and thus make the case turn on a part of the facts, it is error to allow such minutes to be taken out. *Cheek v. State*, 35 Ind. 492. Contra, *Cowles v. Hayes*, 71 N. C. 231 (holding that the jury may copy a memorandum of counsel which was itself a copy of an account proved and admitted in evidence, since this is nothing more than a note of the evidence taken down by the jury). So, in *Omaha F. Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766, it was held no abuse of discretion to permit juries in an action on a policy of fire insurance to make memoranda of the articles testified to have been destroyed by the fire.

3. Several documents.

If there are several documents and counsel do not agree on which shall be sent out, it is proper practice, on sending any one or more out, to send all that have been put in evidence relating to the same subject.

XXIII.—FURTHER INSTRUCTIONS; INDUCING AGREEMENT.

- | | |
|---|--|
| 1. Power and duty of giving further instructions. | 2. Manner of giving.
3. Inducing agreement. |
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1. Power and duty of giving further instructions.

After the jury have retired to deliberate upon their verdict, the judge of his own motion has power to recall them, and in the presence of the parties or their counsel give them further instructions,¹ or withdraw erroneous instructions; but this is in the discretion of the court, and not the legal right of the party.²

When the jury make a reasonable request for further instructions and either party joins in such request, it may be error to refuse.³ But after the jury have retired, the judge is not bound to comply with a party's request to give additional instructions upon a point not covered by a request of the jury;⁴ nor to comply with a party's request to give the jury further instructions by way of explanation or modification of those already given;⁵ for it is a matter within the discretion of the court.

A fresh discussion by counsel of the law or the evidence, in the presence of the jury, cannot be had unless allowed by the judge in his discretion.⁶

When further instructions are given, they are subject to exceptions for error, the same as those given before the jury retired.⁷

¹2 Graham & W. New Trial, 356 (a); Thomp. & M. Juries, § 355, and cases cited. *Com. v. Snelling*, 15 Pick. 321, 333; *Breedlove v. Bundy*, 96 Ind. 319; *Hartman v. Flaherty*, 80 Ind. 472; *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947; *Buck v. Buck*, 4 Baxt. 392; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Wood v. Isom*, 68 Ga. 417.

The trial judge may, upon a report by the jury that they are unable to agree, inquire of them the cause of their disagreement, and restate his views of the law or give additional proper charges in the presence

of the parties and counsel. *Salomon v. Reis*, 5 Ohio C. C. 375. Compare *Swaggerty v. Caton*, 1 Heisk. 199, where, in a criminal case, the jury reported to the judge in open court that they could not agree, but did not ask for further instructions, and it was held error for the judge to repeat to them certain disjointed portions of the charge already given, since it would lead the jury to suppose that such portions of the charge were the controlling features of the case.

The court may, over objection, give an additional instruction to the jury after their retirement in respect to a material point in the case concerning which no instruction has been given, where equal opportunity is first given to each side to submit instructions on that point. *Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854. And see *Hogg v. State*, 7 Ind. 551 (where it was held no error to give further instructions, even against the wishes of counsel for both sides).

**Turner v. Foxall*, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; *Forrest v. Hanson*, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; *United States v. White*, 5 Cranch, C. C. 116, Fed. Cas. No. 16,677; *Norton v. McNutt*, 55 Ark. 59, 17 S. W. 362; *Lafoon v. Shearin*, 95 N. C. 391. See *Tinkham v. Thomas*, 2 Jones & S. 236, where it was held no error for the judge to refuse to receive or entertain proposed requests to charge the jury after they had just been charged and some of them had left the jury box on their way to the jury room, although all of them were still in the courtroom. It is certainly proper for the court to refuse counsel's request that the jury be recalled for further instructions, where no sufficient reason for his request is shown. *Bowling v. Memphis & C. R. Co.* 15 Lea, 122.

*See *Drew v. Andrews*, 8 Hun, 23, where the jury having retired, and having sent in to request the court to give them information as to what a witness had testified to upon a certain point, and the counsel for the losing party having, in the presence of the opposite counsel, asked the court to bring in the jury and state the evidence to them as requested, —the refusal of this reasonable request was one of the grounds upon which a new trial was granted.

In *Cook v. Green*, 6 N. J. L. 109, the court says: "If a jury, after withdrawing to consider the cause, get embarrassed on a question of law, they may, and in prudence ought to, ask for the opinion of the justice thereon, and it is his duty to declare the law to them." So in *Bank of Kentucky v. M'Williams*, 2 J. J. Marsh. 256, it is said to be the duty of the court to instruct the jury on matters of law, after the jury have retired, should they think proper to request it.

But upon the jury's return and request for instructions on a special point it is proper to direct them to follow the instructions already given and to refuse a party's motion to read the particular instructions covering that point where the court expressed his willingness to read all the instructions if the jury so desired. *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

**Kellogg v. French*, 15 Gray, 354; *Harvey v. Graham*, 46 N. H. 175; *Parker v. Georgia P. R. Co.* 83 Ga. 539, 10 S. E. 233.

But where the jury have returned into court for further instructions it is

error for the court to refuse to charge the jury at the request of one of the parties upon a point on which the court has not charged and on which it is proper that the jury should receive instructions. *Yeldell v. Shinkholster*, 15 Ga. 189.

⁹*Nelson v. Dodge*, 116 Mass. 367.

¹⁰*Nelson v. Dodge*, 116 Mass. 367; *Wilkinson v. St. Louis Sectional Dock Co.* 102 Mo. 130, 14 S. W. 177. See *Ruffing v. Tilton*, 12 Ind. 259, where it is held no error to permit counsel to discuss to the court what the form of the verdict shall be, in the presence of the jury, they having come for instructions thereupon.

In *Cotten v. Rutledge*, 33 Ala. 110, it is held that, where both parties have waived their right to argue by declining to do so, allowing one party to reread a record to the jury on their coming for instructions does not revive the right of the other to argue the case.

¹¹*Nelson v. Dodge*, 116 Mass. 367. Further instructions should not be given in such a way as erroneously to cause the jury to ignore other instructions previously given. *Wiggins v. Snow*, 89 Mich. 476, 50 N. W. 991; *Willmott v. Corrigan Consol. Street R. Co.* (Mo.) 16 S. W. 500. In *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145, it is said that the court, when giving further explanation or information at the jury's request, is never justified in giving another full, complete, and different charge upon nearly all or even some of the material questions involved in the case.

2. Manner of giving.

Further instructions as to the case, after the jury have retired, should be given only in open court, and when counsel on both sides are present or have had notice and an opportunity of being present. This is matter of legal right. If either party requests that a further instruction be given, or if the jury send in an inquiry, it is proper practice to submit the answer, in writing, to counsel, and if they consent, to send it to the jury; if counsel do not consent, then to call in the jury and answer their inquiry in open court.¹

¹The authorities are not altogether uniform as to the necessity of the presence of counsel when additional instructions are given. The rule laid down in the text finds support in *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540, in which it was held reversible error for the court to orally charge the jury upon their return into court in the absence of counsel with no attempt to notify them. To the same effect is *Seagrave v. Hall*, 10 Ohio C. C. 395. But if counsel, "sought for honestly at the place of trial, where they ought to be, . . . cannot be found, or, being found, they or either of them refuse to attend, such absence or refusal does not release the justice from his duty to declare the law to the jury." *Cook v. Green*, 6 N. J. L. 109. See also *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430, where it is held no error for the court to give further instructions to the jury during its regular session in open court in the absence of a party or his coun-

sel after the parties and their counsel have been loudly called at the door. So it is not error for the court to give additional instructions publicly during a regular session of the court and after a prolonged but unavailing search for the absent counsel by the officers of the court under its direction. *Cornish v. Graff*, 36 Hun, 160; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253, 10 S. W. 846.

In *Taylor v. Manley*, 6 Smedes & M. 305, judgment was reversed for error in giving instructions to the jury in absence of the parties and without their consent during a recess of the court, even though the jury had returned and asked for an explanation of a matter of law, for it contravened a Mississippi statute requiring instructions to be given at the request of a party. And in *Bryant v. Simmons*, 74 Ga. 405, a remark by the court at the time of taking a recess that a verdict would be received if rendered before a specified time was held to be such notice that nothing would be done in the case during recess except to receive the verdict as to make it error for the court on its own motion to re-charge the jury during recess in the absence of counsel and parties on one side. In *Campbell v. Beckett*, 8 Ohio St. 210, the court quotes, with apparent approval, the passage given above from *Cook v. Green*, 6 N. J. L. 109, but adds that in the case under consideration the instructions were given without notice to the absent counsel, and "during the hours of recess of the court when it was neither the duty nor custom of parties or their counsel to be in the courtroom." It may be added that the Ohio case was decided under a provision of the Code in that state requiring further instructions to the jury to be given in open court "in the presence of, or after notice to, the parties or their counsel;" and the court was of the opinion that the provision was intended to express, and did in fact correctly express, the common-law rule upon the subject.

By the weight of authority, sending for counsel when the jury return into court for further instructions, unless required by statute, is a matter of favor or courtesy and not of right. *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174; *Alexander v. Gardiner*, 14 R. I. 15; *Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528; *Wiggins v. Downer*, 67 How. Pr. 65; *Hudson v. Minneapolis, L. & M. R. Co.* 44 Minn. 52, 46 N. W. 314; *Cooper v. Morris*, 48 N. J. L. 607, 7 Atl. 427. In the case last cited the court says: "In contemplation of law the parties and their counsel remain in court until a verdict has been rendered or the jury discharged from rendering one." So, in *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 7 Am. Rep. 81, where further instructions were given to the jury at their request in open court, but in the absence of one of the parties and his counsel, to whom no notice was given, it was held not to be a private communication, and that the failure of the court to give the customary notice was no error, and that the giving of notice to counsel in such a case is a matter of grace or favor on the part of the court, and not of legal obligation; but that it is the legal obligation and "duty of counsel and suitors to be present in court when their causes are moved or any proceedings taken in them; and if they are not, it is at their own risk, and not at the risk of the other party, if the court sees fit not to notify them." It is to be observed that the

court speak of the fact that the absent party and his counsel were well aware of the hour in the evening to which the court had adjourned for the express purpose of reviewing the verdict, if any, and discharging the jury; and also that the court expressly approve of the custom of giving notice to absent counsel, and makes the significant remark that "the court may proceed without it (notice) subject to the power of opening the proceedings, where sufficient cause of absence is shown, and it appears that injustice has been done." The court distinguished the cases of *Redman v. Gulnac*, 5 Cal. 148, and *Campbell v. Beckett*, 8 Ohio St. 210 (above), from the one at bar, on the ground that the former was a decision under a statute of California positively prohibiting further instructions in the absence of counsel, and that the latter was a case where, unlike the one at bar, the further instructions were given during a recess of the court, and in the absence of both parties and their counsel. But under a statute providing that while the court may adjourn from time to time during the absence of the jury, it is "to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged," it is not error to give further instructions during adjournment, in the absence of counsel who made no arrangement to be called. *Reilly v. Bader*, 46 Minn. 212, 48 N. W. 909.

The jury must be brought into open court to receive any further instructions in the case. *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332, Reversing 54 Ill. App. 611; *O'Connor v. Guthrie*, 11 Iowa, 80; *Greely v. Weaver* (Me.) 2 New Eng. Rep. 459; *Hopkins v. Bishop*, 91 Mich. 328, 51 N. W. 902; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Com. v. Ware*, 137 Pa. 465, 20 Atl. 806; *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52.

As an exception to the rule that further instructions must be given in open court in the presence of counsel, it seems that the judge may go alone to the jurors' room to give them further instructions at their request (*Taylor v. Betsford*, 13 Johns. 487; *Moody v. Pomeroy*, 4 Denio, 115); or may send them written instructions at their request (*Plunkett v. Appleton*, 9 Jones & S. 159), provided that in each case the parties give their express consent, which it seems must be affirmatively proved and cannot be inferred from counsel's failure to object when knowing that the judge is going to do either one of those things (same cases; *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976). In *Whitney v. Crim*, 1 Hill, 61, the complaining party had told the judge that the jury wished to see him, and it was held to be equivalent to an express consent that the justice should go into the jury room. So, too, it seems no ground for a new trial that the jury are given further instructions in their own room provided the parties or their counsel are present, or have notice and an opportunity of being present. *Rogers v. Moulthrop*, 13 Wend. 274; *Cook v. Green*, 6 N. J. L. 109.

The cases in New Hampshire also form an exception to the rule, and it is settled in that state that upon the request of the jury after they have retired, and after the court has adjourned, the judge may send them further instructions in writing as to a matter of law, even though coun-

sel are not present (*School Dist. No. 1 v. Bragdon*, 23 N. H. 507, 517, which states that the broad rule of *Sargent v. Roberts*, 1 Pick. 342, 11 Am. Dec. 185, is not recognized in New Hampshire), but cannot send them further instructions as to a matter of fact (*Sharpley v. White*, 6 N. H. 172, 176), since any error in stating the evidence to the jury could not be corrected, as a matter of law may, upon exceptions to the written instructions, which should be returned by the jury with the other papers in the case when they come into court.

So, too, in South Carolina, what communication may be made by the court to the jury after they have retired is left entirely to the discretion of the judge (*Goldsmith v. Solomons*, 2 Strobb. L. 296, 300, which disapproves of *Sargent v. Roberts*, 1 Pick. 342, 11 Am. Dec. 185).

In Virginia, also, it would seem to be left to the discretion of the judge as to what communications he shall make to the jury during their deliberations. See *Philips v. Com.* 19 Gratt. 485 (where it was held not a ground for new trial that the judge visited the jury in their room and inquired after their health and took personal custody of a juror separated from his fellows for a short time; and the court was also of the opinion that it is "in the competency of a judge out of court, as necessity or occasion may require, to direct, superintend, and charge jurymen and other officers of the court in matters pertaining to their official conduct and behavior out of court"). See also *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, in which the irregularity of returning a correct answer to a question from the jury, without informing counsel until after verdict, was held not sufficient to vitiate a verdict otherwise correct.

In the United States circuit court, sitting in Rhode Island, the practice is that if the jury send a written request for instruction from the court when not in session, the court, after summoning the counsel and making known to them the inquiry of the jury, will then answer it in writing if the court think it safe and proper to do so. *Norris v. Cook*, 1 Curt. C. C. 464, Fed. Cas. No. 10,305.

3. Inducing agreement.

The judge must not coerce the jury into agreement upon a verdict by intimidation or threats to subject them to any unreasonable inconvenience,¹ yet he may and ought to urge upon the jury all proper motives to induce them to agree upon a verdict, such as the propriety of a spirit of legal concession in their deliberations, and the importance to the parties and the public of a verdict and the saving of time and expense of a new trial.²

¹*Spearman v. Wilson*, 44 Ga. 473; *Pierce v. Pierce*, 38 Mich. 412; *Green v. Telfair*, 11 How. Pr. 260; *Slater v. Mead*, 53 How. Pr. 57; *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. Compare *Erwin v. Hamilton*, 50 How. Pr. 32.

Where a jury return and report that they stand eleven to one for plaintiff, the remark of the trial judge in sending them back, that if "any

juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court," warrants a reversal of a judgment upon a verdict for plaintiff. *Lively v. Sexton*, 35 Ill. App. 417.

There should be no intimation of extended confinement if they do not agree. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. Thus, a threat to keep the jury together a period of four days, unless they sooner agree upon a verdict, constitutes coercion inconsistent with their proper independence. *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19. And it is error to compel the jury to bring in a verdict or remain in confinement for four days without the aid, protection, or even presence of the court. *Ingersoll v. Lansing*, 51 Hun, 101; *McCormick v. Cox*, 8 Colo. App. 17, 44 Pac. 768 (two days). So, it is error to state that the jury will be kept together during the entire term if it lasts three weeks, unless they sooner agree upon a verdict, where a verdict was returned the next day. *Chesapeake, O. & S. W. R. Co. v. Barlow*, 86 Tenn. 537, 8 S. W. 147. And in *North Dallas Circuit R. Co. v. McCue* (Tex. Civ. App.) 35 S. W. 1080, it was held that the court has no authority to tell the jury that he will keep them together until the term has expired, if necessary.

But see *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, in which it was held to be no abuse of discretion for the court to state that he would keep the jurors together until the end of the term, unless they returned a verdict, and that the case was so plain that it ought to be decided in five minutes, though it was said to be the better practice not to state how long the jurors will be kept together unless they sooner agree. So it is not error for the court to state that there are two more weeks of the term and that he will give the jury plenty of time to consider, accompanied by a direction to the sheriff to provide comfortable accommodations for them. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285. Nor can the jury be deemed to have been coerced into rendering a verdict by the statement of the judge immediately before they retired that if they did not agree upon a verdict until after adjournment they should seal their verdict and separate and not return until the following Tuesday, the next day being Saturday on which the court did not sit for jury trials, and the following Monday being a holiday. *Darlington v. Allegheny City*, 189 Pa. 202, 42 Atl. 112. The court says that the judge had a right to assume that the jury knew that if they did not agree they could communicate with him or other judges of equal power. But in *McCoombs v. Foster*, 64 Mo. App. 613, it was held that a statement by the court to the jury on Saturday evening, that he must leave on a specified train, and that if they cannot agree before train time he will leave some one to receive their verdict, and that they can stay until morning if they do not sooner agree, was reversible error, where the jury returned a verdict in a few minutes after being informed by the sheriff at the court's direction that it was time for him to go and that he wished them to report the prospect of a verdict.

It is no longer permissible to starve a jury into returning a verdict. Thus it is error to inform a jury which has been out all night with-

out supper or breakfast that meals will be allowed them only at their own expense, where an agreement was reported within ten minutes thereafter. *Physioc v. Shea*, 75 Ga. 466. And instructing a jury shortly before midnight on Saturday that they will have to cease deliberation during Sunday and will be kept together and given their meals and a place to sleep at their own expense is sufficient to require the setting aside of a verdict which was rendered by the jury a few minutes later. *Henderson v. Reynolds*, 84 Ga. 159, 7 L. R. A. 327, 10 S. E. 734. And a verdict agreed upon within several hours after an order of the court that the jury be locked up until they should agree, without allowing them to have dinner, was set aside in *Hancock v. Elam*, 3 Baxt. 33.

Upon the question of the coercion of a disagreeing jury generally, see note to *Darling v. New York, P. & B. R. Co.* (R. I.) 16 L. R. A. 643.

**Green v. Telfair*, 11 How. Pr. 260; *Allen v. Woodson*, 50 Ga. 53; *Pierce v. Rehfuß*, 35 Mich. 53; *Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795. But instructing them that they must compromise on the amount, held error. *Edens v. Hannibal & St. J. R. Co.* 72 Mo. 212. See also *North Dallas Circuit R. Co. v. McCue* (Tex. Civ. App.) 35 S. W. 1080, in which it was held that the court has no authority to tell the jury of the trouble and expense of trials.

The court may properly advise the jury that it is their duty to try to agree. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108; *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499. And in sending back a jury for further deliberation may state that the court does not think it will trouble them to agree by following the rule that in civil cases the jury may upon conflicting evidence find a verdict in accordance with the preponderance of the testimony. *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955. And it is proper to state that while no juror is required to surrender his conscientious convictions for the sake of reaching a verdict, the fact that his judgment is opposed to that of a majority of his fellows should induce him to doubt the correctness of his own views and to weigh carefully the opinions of his associates and the arguments and reasons on which they are founded. *Ahearn v. Mann*, 60 N. H. 472; *Gibson v. Minneapolis, St. P. & S. S. M. R. Co.* 55 Minn. 177, 56 N. W. 686. This on the principle that all men usually know more than one man and that he ought to give due deference to the will of the majority. *Cowan v. Umbagog Pulp Co.* 91 Me. 26, 39 Atl. 340. So, it is proper to instruct the jury that no juror should refuse to agree from mere pride of opinion, though he should not surrender any conscientious views. *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190. But a statement of the trial judge upon calling the jury into court, and being informed that eleven of the jurors could agree on a verdict, that he trusted that every juror was acting rationally and that no one was acting from a dogmatic spirit merely for the purpose of asserting his opinion, constitutes reversible error. *McPeak v. Missouri P. R. Co.* 128 Mo. 617, 30 S. W. 170.

Any language of the court is improper which may reasonably be construed to mean that a juror may yield individual convictions of right and agree with his fellows for the sake of reaching a verdict, whether or not his judgment is convinced and his conscience satisfied. *Randolph*

v. Lampkin, 90 Ky. 551, 10 L. R. A. 87, 14 S. W. 538; *Goodsell v. Seeley*, 46 Mich. 623, 10 N. W. 44; *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075; *Mahoney v. San Francisco & S. M. R. Co.* 110 Cal. 471, 42 Pac. 968. Thus, it is error for the court to state to the jury, after their failure to agree, that if they cannot obtain exactly what they want "get the next best thing to it." *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. And it is error to instruct the jury that the law expects and will tolerate reasonable compromise and concessions in order to arrive at a verdict. *Richardson v. Coleman*, 131 Ind. 210, 29 N. E. 909. And an assignment of error that the remarks of the court coerced the jury into rendering a verdict not in accordance with their belief will be sustained, where they were told that the rendition of the verdict was a matter of judgment, and not of conscience. *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. And to state that "no juror ought to remain entirely firm in his own conviction one way or the other until he has made up his own mind beyond all question that he is necessarily right and the others are necessarily wrong" is to announce an incorrect statement of law which will require reversal. *Cranston v. New York C. & H. R. R. Co.* 103 N. Y. 614, 9 N. E. 500.

In order that a verdict may result from a further deliberation of the jury after proper admonitions as to their duty to try to agree, it is well settled that it is entirely within the sound discretion of the judge as to how long to keep them together, and it is no error or irregularity for him to refuse to discharge them until he is satisfied that there is no reasonable prospect of an agreement. *White v. Calder*, 35 N. Y. 183, 33 How. Pr. 392; *Erwin v. Hamilton*, 50 How. Pr. 32; *Coit v. Waples*, 1 Minn. 134, Gil. 110; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769; *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990. See *People v. Green*, 13 Wend. 55, where the jury were discharged after they had deliberated only thirty minutes, and, although a criminal case, the rule seems to apply with even greater force in civil cases.

When satisfied there is no reasonable prospect of an agreement it is his duty to discharge them. *People v. Green*, 13 Wend. 55; *Green v. Telfair*, 11 How. Pr. 260. But the judge cannot make an agreement of the jury a condition of their discharge. *Slater v. Mead*, 53 How. Pr. 57.

And it seems he should not intimate to them how long he intends to keep them together. *Green v. Telfair*, 11 How. Pr. 260; *Reg. v. Charlesworth*, 1 Best. & S. 523, where Crompton, J., says: "It is a dangerous thing to say that the jury should be discharged in a certain time, or in a few hours. I think that they ought to be kept, not, as the chief justice says, to coerce them, but for such a time as that they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.'" Compare *Erwin v. Hamilton*, 50 How. Pr. 35. In some states the matter is regulated by statute; as in New York, where, following the common-law rule, the Code of Civil Procedure, § 1181, provides that the jury may be discharged, in case of disagreement, after being kept together for such a time as is deemed reasonable by the court. N. Y. Code Civ. Proc. §§ 1181, 3347.

XXIV.—THE VERDICT AND ITS INCIDENTS.

1. Form of general verdict.
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1. Form of general verdict.

In the absence of an express statute,¹ or rule of court,² prescribing the form of a general verdict to be returned by the jury, the form of the verdict is governed by no hard and fast rule; and so long as it clearly manifests the intention and finding of the jury upon the issue submitted to them, it will not be overthrown because of defects of form merely.³

¹Statutes sometimes prescribe the form of the verdict. Thus, an article of the Louisiana Code of Practice (art. 522) declares that "the form of a general verdict consists in the foreman indorsing on the back of the petition these words, 'verdict for the plaintiff for so much, with interest,' if it has been prayed for; or 'verdict for the defendant,' according as the verdict is for plaintiff or defendant." This article is, however, held to be directory merely and a substantial compliance therewith is sufficient. *Wichtrecht v. Fasnacht*, 17 La. Ann. 166 (sustaining a verdict thus,—“we agree to give to”).

The Louisiana statute was held, however, to have no application to a verdict rendered in a Federal court sitting in that state, in *Parks v. Turner*, 12 How. 39, 13 L. ed. 883; the sufficiency of the verdict in its form, as well as the question of its force and effect, depending upon the rules of the common law and the statutes of the United States. This case, it

will be seen, was decided prior to the act of Congress of June, 1872, conforming the practice, pleadings, and form and mode of proceeding in the Federal courts as nearly as may be to that of the state courts in which they are sitting; and the question as to whether the form of a verdict to be returned by a jury in a Federal court is to be governed by a local statute or rule of court, if there be such, does not seem directly to have been passed upon.

*Thus rule 33 of the Massachusetts superior court of 1874 prescribed that "the general form of verdict shall be as follows: If for plaintiff, 'The jury find for the plaintiff, and assess damages in the sum of —;' if for the defendant, 'The jury find for defendant,'— unless the court shall in particular cases otherwise order." And a paper signed by the foreman of the jury, although it did not mention the name of the case in which it was rendered, finding "for plaintiff in the sum" specified, and which showed that it had been rendered in open court as the verdict in that case, and had been filed in the case as such verdict, was held to be an effective verdict for plaintiff within the rule of court mentioned, inasmuch as the record of the court supplied any omission as to the title of the cause, in *Miller v. Morgan*, 143 Mass. 25, 8 N. E. 644.

And the 42d common law rule of that court, in effect July 1, 1900, is in the same language as rule 33, quoted above.

**Lincoln v. Cambria Iron Co.* 103 U. S. 412, 26 L. ed. 518.

The rule is that a verdict is not bad for informality if the court can understand it. It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided except from necessity. *Steele v. Empson*, 142 Ind. 397, 41 N. E. 822. And immaterial defects or unimportant inaccuracies will not prevail to overthrow the verdict. *Case v. Hall* (Ind. Terr.) 46 S. W. 180, citing Elliott, Appellate Procedure, p. 292, § 342; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Floege v. Wiedner*, 77 Tex. 311, 14 S. W. 132; *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479.

Nor will mere clerical inaccuracies be permitted to destroy a verdict otherwise unobjectionable; such as, "We, the jurors" instead of "We, the jury," or misspelling the word "foreman." *Ryors v. Prior*, 31 Mo. App. 555. Or a slight error in spelling the plaintiff's name in the body of the verdict, his name being correctly spelled in the other places where found. *Missouri, K. & T. R. Co. v. Turley* (Ind. Terr.) 37 S. W. 52. To similar effect see *Edmondson v. Beals*, 27 Kan. 656.

The mere fact that the verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. Indeed, it need not be entitled at all. *McGarrity v. Byington*, 12 Cal. 426.

And a verdict the caption to which named the defendant, a railroad corporation, by its initials merely, but otherwise sufficiently identified the cause, and in which the findings of the issue submitted could be ascertained and clearly understood, was upheld in *Kelsey v. Chicago & N. W. R. Co.* 1 S. D. 80, 45 N. W. 204. And in *Missouri P. R. Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322, a verdict against a corporation described by abbreviations of the several words constituting its name

was held to authorize the entry of a judgment against the corporation by its proper name, the verdict indicating with sufficient clearness the party against which it was rendered.

So, also, that the jury say they "believe" instead of "find" is a mere formal defect, not invalidating the verdict, see *Patton v. Gregory*, 21 Tex. 513. "What they find or what they believe is from the evidence, and in either form of expression amounts to the same thing."

Nor is the validity of the verdict affected by the use of the dollar sign (\$) instead of the word dollars, in assessing damages. *Mayson v. Sheppard*, 12 Rich. (L.) 254.

Nor will the omission of the word "dollars" following the amount of the recovery awarded affect the validity of the verdict. *Hopkins v. Orr*, 124 U. S. 510, 31 L. ed. 523, 8 Sup. Ct. Rep. 590. So held also of the omission of the dollar sign preceding the amount of the recovery set out in figures. *Provo Mfg. Co. v. Severance*, 51 Mo. App. 260. See also *Hall v. King*, 29 Ind. 205 (sustaining a verdict assessing the amount of the recovery at a sum specified in words, but omitting the word "dollars," but in which the amount was also set out in figures to which was prefixed the dollar sign (\$). In Illinois a verdict in which the word "dollars" is omitted is defective in substance (*Kankakee Stone & Lime Co. v. Cogan*, 74 Ill. App. 78), unless it appears that the clerk in reading the verdict supplies the omitted word, and the jury through the foreman, in response to the question propounded by the clerk, declare that the verdict as read by the clerk is their verdict. *Griffin v. Larned*, 111 Ill. 432; *Mexican Amole Soap Co. v. Clarke*, 72 Ill. App. 655.

Nor does the omission of both the word "dollars" and the dollar sign, where the suit is for money and the charge does not authorize the recovery of anything else. *Gulf, C. & S. F. R. Co. v. Fink*, 4 Tex. Civ. App. 269, 23 S. W. 330.

As to the power of the judge to authorize the jury to bring in a sealed verdict, see *ante*, Division XXI. *The Instructions*, § 82.

And as to receiving a sealed verdict, see *post*, Division XXV. *Receiving Verdict*, § 5.

As to the necessity for the presence of the parties when a verdict is received; the time when and the place where it may be received; the correction of the verdict; failure of the jury to answer special interrogatories or to agree generally; the effect of special findings, and other questions raised when the verdict is received, or by applications after verdict, see *post*, Divisions XXV. and XXVI.

2. — of special verdict.

The form of a special verdict is largely in the discretion of the trial court,¹ and one which covers the issues will not be disturbed because of objections to its form.²

¹In practice, the formal preparation of a special verdict is made by the counsel for the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and

with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision except the question of law inferentially arising on the facts stated in the general verdict. *Suydam v. Williamson*, 20 How. 427, 15 L. ed. 978. And ordinarily no competent or careful attorney would neglect so important a matter as this. *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370.

But the degree of supervision which the court may exercise over the forms submitted must manifestly be left largely to its discretion, since it is the duty of the court to instruct the jury so far as to enable them clearly to comprehend the matters in issue and the subject to be covered by the special verdict.

But the verdict proposed should fairly cover and include all the controverted issues, and be reasonably specific. *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 358, 21 N. W. 227; *McLimans v. Lancaster*, 63 Wis. 604, 23 N. W. 689. Otherwise there must necessarily be a failure to determine such issues and the result must be a mistrial. *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180. See, further, *Responsiveness to Issues*, *infra*, § 9. But the court should not be required to prepare the verdict. *Case v. Ellis*, 4 Ind. App. 224, 31 N. E. 917. See fully on this subject, *ante* Division XXI. §§ 69-76.

It should not be in the form of interrogatories submitted to the jury and their answers thereto. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

In Indiana, however, the legislature changed the practice as it formerly existed, of permitting the court to submit to the jury two special verdicts drafted by the respective parties in a narrative form, leaving the jurors to accept and return the one which they considered the evidence sustained (See *Hopkins v. Stanley*, 43 Ind. 558, for the former rule), and now requires that a special verdict shall be framed by the means of interrogatories, each of which is to be answered by the jury, under the evidence, and each to be so framed as to require the finding thereon to embrace but a single fact. The statute as amended directs that counsel on either side shall prepare such special verdict, meaning and intending that counsel on each side shall prepare such a number of interrogatories as may be necessary to cover all of the facts material to the issues in the action, all of which interrogatories are to be submitted to the court, subject to its change, modification, and final approval. When so approved, the court causes them to be numbered, not in separate sets, but as an entirety from one to the close, and submit them to the jury with the instruction that each be answered and all returned as a special verdict in the cause. *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595.

So, also, in Wisconsin, a special verdict is in the form of interrogatories submitted to the jury to be answered by them. *Sanb. & B. Wis. Stat.* § 2858. Compare other codes and statutes on this question.

²*Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125. As where it is inartificially worded. *Fenn v. Blanchard*, 2 Yeates, 543.

Nor is the formal conclusion, finding in the alternative on the facts found, necessary to the validity of a special verdict otherwise unobjectionable. *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595, and cases cited; *Hendrickson v. Walker*, 32 Mich. 68. Although it is proper for the court in case of such omission to send the jury back with instructions to add the proper formal conclusion. *Toler v. Keiher*, 81 Ind. 383.

And it is no objection that a special verdict, after finding the facts upon which it calls for the application of the law for the plaintiff, makes a further finding of fact before asking for the conclusion of law for defendant. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443.

3. Verdict may be oral or written.

Nor does the validity of a verdict depend upon its being reduced to writing, but it may be given in by the foreman of the jury either orally or in writing,¹ at least unless it is expressly required by statute that the verdict shall be in writing.²

¹The verdict may be reduced to writing and signed by the jury or it may be delivered *ore tenus* by the foreman. The validity of the verdict does not depend upon its being reduced to writing and signed by the members of the jury, but whatever may be pronounced by the jury in open court, whether in writing or verbally through the foreman, is to be regarded as the verdict of the jury. *Griffin v. Larned*, 111 Ill. 432. By express statute in Illinois the verdict may be oral. 3 Starr & C. Anno. Stat. p. 3054, § 57.

The jurors acting as a body speak through their foreman. They declare by his voice their verdict and their assent to the same as recorded; and his assent is conclusive upon all unless a disagreement be expressed at the time. *Blum v. Pate*, 20 Cal. 70.

And it has been held in a Louisiana case that the validity of a verdict is not affected by the fact that it is written in a foreign language, the only one in which the jurors can write, where it is translated into English under direction of the court, read to the jury as translated, assented to by them as read, signed by their foreman, and recorded by the clerk in their presence. *Walsh v. Barrow*, 3 La. Ann. 265.

²Statutes in several states require the verdict to be in writing and signed by the foreman of the jury; and many courts have held the provision relating to the signature of the foreman to be directory merely (see cases cited to note in next succeeding section), without passing directly on the question whether or not the requirement that the verdict must be in writing is mandatory. See, for instance, *McFarland v. Muscatine*, 98 Iowa, 199, 67 N. W. 233; *Berry v. Pusey*, 80 Ky. 166. In *Sage v.*

Brown, 34 Ind. 464, however, it was said that there could be neither a general nor a special verdict unless in writing and signed by the foreman as provided by statute, although the question there was as to the signature of the foreman to special findings. And *Miller v. Mabon*, 6 Iowa, 456, seems to hold that under the Iowa statute the verdict must be in writing.

It would seem, however, from *Sage v. Brown*, 34 Ind. 464, that these requirements may be waived by consent of the parties through their counsel. See also *Menne v. Neumeister*, 25 Mo. App. 300.

4. Signing the verdict.

Nor need the verdict be signed,¹ unless required by statute.²

¹At common law a verdict need not be signed. *Gurley v. O'Dwyer*, 61 Mo. App. 348; *Duncan v. Oliphant*, 59 Mo. App. 1. And see *Com. v. Ripperdon*, Litt. Sel. Cas. 195, where the court said "We are not apprised of any law requiring the verdict of a petit jury, either in a criminal or civil case, to be signed; and it would, no doubt, be good without it; yet we know that it is the usual practice for one of the jury to sign it, and very often as foreman. But most certainly the omission of this circumstance would not render it void." There is now, however, a statute in Kentucky requiring the verdict to be signed by the foreman of the jury. See next succeeding note.

But a paper purporting to contain a verdict of a jury delivered by the foreman to the clerk, but not signed by him or by the jury, and not assented to by the jury as their finding, cannot be entered of record as their verdict, after their discharge from further consideration of the case. *Rose v. Harvey*, 18 R. I. 527, 30 Atl. 459. As to whether the discharge of the jury terminates their power over the verdict, see *post*, Division XXVI. § 1.

²As stated in a previous note (see note 2, preceding section), statutes in several of the states required the verdict to be signed by the foreman; but this provision is usually held to be directory. *Morrison v. Overton*, 20 Iowa, 465; *McFarland v. Muscatine*, 98 Iowa, 196, 67 N. W. 233; *Berry v. Pusey*, 80 Ky. 166; *Gurley v. O'Dwyer*, 61 Mo. App. 348. "The foreman's signature is a mere element in the formal authentication of the verdict. The statutes requiring it must . . . be regarded as directory only, and not mandatory or as prescribing an essential to the validity of the proceeding." *Menne v. Neumeister*, 25 Mo. App. 300. And in *Harris v. Barden*, 24 Ga. 72, an action on a judgment, objection was made to the introduction of the judgment in evidence on the ground that it did not contain the names of the jurors by whom the verdict was rendered, but the court, reversing the trial court, held the objection to be without merit, saying: "This objection is based on the mode of proceeding in England. . . There, where the trials are at bar or at *nisi prius*, each cause has its distinct jury, and the names of the jurors appear in the judgment roll. Here, our juries are impaneled differently, and all causes at issue, at one term of the court, are submitted

to juries, summoned and impaneled according to our statutes for the trial of every cause depending between parties litigating at that term. Their names appear on the minutes at the beginning of the term. In no case tried by a petit jury do the names of the jurors who tried it appear in the verdict . . . but, if in any case, that be not done, and the verdict appears in the record without his [the foreman's] signature, and a judgment is signed thereupon, it must be presumed that the verdict was satisfactory to the court, and deemed by it to be sufficient, in form and substance, to warrant the judgment."

And interrogatories and answers are not to be disregarded on the ground that they are not signed by the foreman of the jury, merely because the word "foreman" is not added to the name, where his name is properly signed as foreman to the general verdict. *Norwich Union F. Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 984.

But the failure of the foreman of a jury to sign the verdict if material is waived by permitting the verdict to be received and judgment rendered thereon without objection. *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *Duncan v. Oliphant*, 59 Mo. App. 1 (holding proper method of reaching objection to be by motion in arrest.)

So held, also, of a failure of the foreman to sign answers to special interrogatories. *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *Menne v. Neumeister*, 25 Mo. App. 300.

In Texas, a statute authorizes trials with a jury of less than twelve, but not less than nine, without regard to the consent of the parties, and in such case the verdict must be signed by each of the jurors returning it. But where, by consent and agreement of the parties, as provided by the statute, the trial is had with less than twelve jurors, one of them having been excused during trial, their verdict is sufficient if signed by only one of them as foreman. *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. 724. The rule prescribed for verdicts requiring the signatures of all the jurors has no application in such case. *Bluefields Banana Co. v. Wollfe* (Tex. Civ. App.) 22 S. W. 269.

5. Surplusage.

Matter contained in a verdict which is immaterial or not responsive to the issues may be treated as surplusage,¹ and rejected, so as to validate the verdict, if the remaining portion thereof is responsive to the issues and not otherwise objectionable.²

"If the jury give a verdict of the whole issue, and of more, etc., that which is more is surplusage, and shall not stay judgment; for *utile per inutile non vitiatur*, but necessary incidents required by law the jury may finde." 2 Co. Litt. 227a.

The maxim is, *Utile per inutile non vitiatur*; and the maxim is constantly applied to uphold verdicts in which the useless matter may be rejected as surplusage. *Martin v. Ohio River R. Co.* 37 W. Va. 349, 16 S. E. 589.

So, in *Windham v. Williams*, 27 Miss. 313, it is said that "if more be found than is necessary, it may be disregarded as surplusage, but it does not vitiate that which is necessary and well found."

Lassiter v. Thompson, 85 Ala. 223, 6 So. 33; *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Hudson v. Hawkins*, 79 Ga. 274, 4 S. E. 682; *North & South Street R. Co. v. Crayton*, 86 Ga. 499, 12 S. E. 877; *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053; *Van Meter v. Barnett*, 119 Ind. 35, 20 N. E. 426; *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709 (special verdict); *Wilson v. Durant* (Ind. Terr.) 42 S. W. 282; *Miller v. Shackelford*, 4 Dana, 264 (special verdict); *Tuley v. Mauzey*, 4 B. Mon. 5; *Pejepscoot Proprs. v. Nichols*, 10 Me. 256; *Ashton v. Touhey*, 131 Mass. 26; *Gover v. Turner*, 28 Md. 600; *Rawson v. McElvaine*, 49 Mich. 194, 13 N. W. 513; *Coit v. Waples*, 1 Minn. 134, Gil. 110; *Windham v. Williams*, 27 Miss. 313; *Hancock v. Buckley*, 18 Mo. App. 459; *Tucker v. Cochran*, 47 N. H. 54; *Hawkins v. House*, 65 N. C. 614; *Richmond v. Tallmadge*, 16 Johns. 307 (special verdict); *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51; *Foote v. Woodworth*, 66 Vt. 216, 28 Atl. 1034 (*dictum*); *Martin v. Ohio River R. Co.* 37 W. Va. 349, 16 S. E. 589; *Parkinson v. McQuaid*, 54 Wis. 475, 11 N. W. 682.

So held as to conclusions of law contained in a special verdict. *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Erwin v. Clark*, 13 Mich. 10; *Smith v. Ireland*, 4 Utah, 189, 7 Pac. 749.

And of findings in a special verdict which are outside the issues. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246. See also *Responsiveness to Issues*, *infra*, § 9, note 2.

And a verdict which is a distinct and explicit finding with respect to the cause of action alleged by each party is not invalidated by the fact that it improperly attempts to apportion the costs, and should not be refused, as the improper finding may be rejected as surplusage. *State ex rel. Fuller v. Beall*, 48 Neb. 817, 67 N. W. 868 (where mandamus to compel the judge to receive and enter of record such a verdict was granted).

But a portion of a verdict clearly responsive to an issue cannot be treated as surplusage merely because it is clearly erroneous and based upon improper considerations. *McNairy v. Gathings*, 57 Miss. 215 (holding thus as to an improper assessment of damages).

6. Special verdict must find ultimate facts.

A special verdict should not find facts which are merely evidentiary in nature,¹ and which merely tend to prove the existence of the ultimate facts; but it should find the ultimate facts in issue.²

Nor should a special verdict contain conclusions of laws.³

But a special verdict, though needlessly prolix, and though containing matters of law and of evidence, will nevertheless be upheld if, after eliminating or disregarding the improper matter, it still contains facts sufficient to sustain the judgment.⁴

¹The facts involved in the judgment of a special verdict are divided into two classes—*evidentiary* facts and *inferential* facts. It is the duty of the jury to *consider* the evidentiary facts, but to *find* the inferential facts; and if the special verdict upon its face that the jury found

the evidentiary but not the inferential facts, the verdict is ill, because it shows that the jury ought to have found other facts, viz., the inferential. *Locke v. Merchants Nat. Bank*, 66 Ind. 353.

"A special verdict should set forth all facts established by the evidence, so far as they may be necessary to delineate the rights of the parties and present the questions of law involved in the issue; and it should set forth facts only, as distinguished from evidence, immaterial circumstances, argumentative inferences, or conclusions of law; but it should also set forth such documentary evidence as may be matter for judicial construction; and, where the facts established by the evidence are of the nature of circumstantial evidence, the verdict should not stop until the functions of the jury are exhausted, and the ultimate fact which may be deduced from the circumstantial facts is found." *Ross v. United States*, 12 Ct. Cl. 565.

The evidentiary facts are merely the evidence, and if found in a special verdict cannot afford any support to a judgment.

The party having the burden of the issue cannot have judgment unless the special verdict finds all the facts essential to a recovery. And where plaintiffs have the burden, and none of the facts essential to their recovery are found in the special verdict, the defendant's motion for judgment in his favor should be sustained, unless the condition of the verdict is such as to make the defendant's remedy either a motion for a *venire de novo* or for a new trial. The reason of the general rule in cases where the special verdict fails to find all the facts essential to a recovery by the plaintiff or the party having the burden, that the other party is entitled to judgment, is that, nothing appearing in the verdict to the contrary, the presumption is that the fact or facts not found were not so found because they were not proved, and hence the verdict in such case is not defective.

Such a verdict is usually held not to be defective because a failure to find facts, the burden of which, under the issues, rested on the plaintiff, is deemed equivalent to a finding against the plaintiff as to the existence of those facts, and an express finding against the plaintiff on any or all of the issues is not a defective finding or verdict. But that is the rule only where there is nothing in the verdict to the contrary.

Where, however, the verdict shows that the jury have found the evidentiary facts instead of the inferential facts; that they have found the evidence instead of the facts in issue, it cannot be said that a presumption arises that the facts in issue were not proved. Because, as the verdict shows, they have found evidentiary facts enough to establish the inferential facts alleged in the complaint. Such a verdict shows that the facts in issue were proved but not found. *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879, and cases cited.

"A special verdict should find facts to which the law gives a determinate effect, conclusive of the issue. *Leach v. Church*, 10 Ohio St. 148. To the same effect see: *Suydam v. Williamson*, 20 How. 427, 15 L. ed. 978; *Ross v. United States*, 12 Ct. Cl. 565; *Conner v. Citizens Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441, and cases cited; *Boyer v.*

Robertson, 144 Ind. 604, 43 N. E. 879; *Hankey v. Downey*, 3 Ind. App. 325, 29 N. E. 606; *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; *First Nat. Bank v. Peck*, 8 Kan. 660; *Langley v. Warner*, 3 N. Y. 327; *Rogers v. Eagle F. Ins. Co.* 9 Wend. 611; *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262; *Leach v. Church*, 10 Ohio St. 148; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011 (*dictum*).

A special verdict is necessarily imperfect and insufficient if it devolves upon the court the duty of deducing from the evidence the ultimate conclusion on a material issue of fact which the jury ought to draw. *Monticello Bank v. Bostwick*, 40 U. S. App. 721, 77 Fed. Rep. 123, 23 C. C. A. 73.

**Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Miller v. Shackelford*, 4 Dana, 274; *Peterson v. United States*, 2 Wash. C. C. 36, Fed. Cas. No. 11,036.

That they are contained in the verdict does not affect the validity of it: they may be disregarded as surplusage. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582. See also next succeeding note. And see *Surplusage*, *supra*, § 5.

*The elementary and familiar rule is that verdicts are to receive a reasonable construction, and not to be disregarded, if, upon a reasonable construction, they can be sustained. It is quite difficult for the trained lawyer, with ample time and deliberation, to nicely and accurately draw the line between facts and evidence. There is, it is true, a difference; for facts are the result of proof, and evidence the means by which the proof is made. *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82. But there are cases where the dividing lines so shade into each other that it is quite difficult to trace them, under any circumstances; and where the hurry and excitement of a trial are pressing upon counsel they cannot be expected to be entirely and absolutely accurate in preparing special verdicts in all cases. It is evident that, if the rule upon the subject of special verdicts was very illiberal or extremely strict, few verdicts would stand; and yet, in justice all ought to stand, unless it clearly appears that material facts are absent. Facts may be clouded and obscured by improper matters of surplusage, but, if they are actually in the verdict, judgment should nevertheless be given upon it. For instances of the application of this rule, see *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98, and cases cited; *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220, 10 L. R. A. 250, 25 N. E. 812; *Reeves v. Grotten-dick*, 131 Ind. 107, 30 N. E. 889; *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Terre Haute & I. R. Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178; *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 630, 50 N. E. 779. See also *Surplusage*, *supra*, § 5.

7. Conforming verdict to evidence.

A verdict or finding of the jury must be based upon and conform to the evidence; and a verdict wholly unsupported by any evidence whatever should not be allowed to stand.¹

But that a verdict is against evidence, or that the evidence is insufficient to support it, is no objection unless there is such a preponderance of proof on the other side as to show that manifest injustice has been done by the verdict, and to warrant the conclusion the jury have mistaken or failed properly to weigh the evidence, or that some mistake has been made in the application of legal principles, or to justify the suspicion of corruption, prejudice, or partiality on the part of the jury.²

¹*Campbell v. Jones*, 38 Cal. 507; *Bucki v. Seitz*, 39 Fla. 55, 21 So. 576; *Sinclair v. Hewett*, 102 Ga. 90, 29 S. E. 139; *Ford v. Central Iowa R. Co.* 69 Iowa, 627, 21 N. W. 587, 29 N. W. 755; *Wilson v. Hawkeye Ins. Co.* 70 Iowa, 91, 30 N. W. 22; *Casey v. Louisville & N. R. Co.* 84 Ky. 79 (special verdict); *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568. See also *Continental L. Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, where it is said that whenever it can be said that there is clear and convincing proof of an essential fact, contrary to the finding of the jury and that the verdict is without any evidence fairly tending to sustain it, the verdict ought not to stand; but held that that could not be said of the verdict in that case.

So held as to a general verdict for the gross amount sued for, where the plaintiff joins two causes of action, and shows liability of defendant on the first cause, but not on the second. *Kent v. Abeel*, 12 Colo. 547, 21 Pac. 718.

Or where the only ground upon which the verdict rendered for plaintiff could be based was thoroughly disproved. *Goss & P. Mfg. Co. v. Suelau*, 35 Ill. App. 103.

Or where the verdict is based upon evidence consisting of an instrument invalid by reason of noncompliance with a statutory requirement, and therefore incompetent as evidence, although it was received in evidence with the consent of the adverse party, but under a misapprehension by both court and counsel as to its legal effect. *Vanderlinde v. Canfield*, 40 Minn. 541, 42 N. W. 538.

Or where an important special finding of the jury, sufficient of itself to sustain a verdict and judgment, is wholly unsupported by the evidence, and such finding is the probable support for other important and material findings, and the verdict is against the great preponderance of the evidence. *Kansas City & P. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292.

And a jury should not be allowed to give a plaintiff a verdict against his own admissions and his own case as he makes it out, without any other reliance or evidence. *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400, 43 N. W. 370.

Nor to make a finding inconsistent with an undisputed fact in the case. *Murphey v. Weil*, 89 Wis. 146, 61 N. W. 315.

Omission to ask direction of a verdict in his favor by a plaintiff constitutes an admission that there is evidence sufficient to carry the case to a

jury, and precludes asking that a new trial be granted on the ground that there is no evidence to support the verdict; but not where the ground asserted is that the verdict is against the weight of the evidence, or is founded on insufficient evidence. *Slater v. Drescher*, 72 Hun, 425, 25 N. Y. Supp. 153; *Haist v. Bell*, 24 App. Div. 252, 48 N. Y. Supp. 405.

A statute providing that not more than two new trials shall be granted to the same party deprives the trial judge of power to set aside a third verdict upon the sole ground that the evidence is insufficient to support it where two former verdicts have been set aside at the instance of the same party for that cause alone, although the judge may think the evidence weak and insufficient; but not where there is no evidence whatever to support it. In such case he may set aside a third or any subsequent verdict upon motion of the same party. *East Tennessee, V. & G. R. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652.

**Cooke v. Navarro*, 29 Fed. Rep. 346; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Foster v. Smith*, 52 Conn. 449; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Johnson v. Norton*, 64 Conn. 134, 29 Atl. 242; *Empire Coal & Min. Co. v. McIntosh*, 82 Ky. 554; *McNerney v. East Livermore*, 83 Me. 449, 22 Atl. 372; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Hopkins v. Ogden City*, 5 Utah, 390, 16 Pac. 596. And for some instances of verdicts which were held objectionable within this rule, see: *Marks v. Boone*, 24 Fla. 177, 4 So. 532; *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Rapp v. Washington & G. R. Co.* 26 Wash. L. Rep. 210; *Chicago, K. & N. R. Co. v. Muncie*, 56 Kan. 210, 42 Pac. 710; *Cherokee & P. Coal & Min. Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766; *Smith v. California Ins. Co.* 85 Me. 348, 27 Atl. 191; *Reid v. Young*, 7 App. Div. 400, 39 N. Y. Supp. 899; *Averill v. Robinson*, 70 Vt. 161, 40 Atl. 49; *McCoy v. Milwaukee Street R. Co.* 82 Wis. 215, 52 N. W. 93.

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion, of prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.

That the evidence was so conflicting as to warrant the court to submit it to the jury does not necessarily forbid the trial judge from setting the verdict aside as against the weight of evidence. *Suhrada v. Third Ave. R. Co.* 14 App. Div. 361, 43 N. Y. Supp. 904.

The Missouri statute, providing that only one new trial shall be allowed to either party, except for the reasons specified therein, gives the trial court the right to grant one new trial on the ground that the verdict is against the weight of the evidence, although other new trials may

have been granted for other reasons. *Dcan v. Firc Asso. of Philadel-
phia*, 65 Mo. App. 209.

That the trial court cannot, in an action triable by a jury as a matter of right, disregard the verdict and findings of the jury and make findings of its own on which to base a judgment, see *Hill v. Ellis*, 5 Kan. App. 532, 48 Pac. 204.

As against the objection of the insufficiency of the evidence to support the verdict, it is sufficient that there is some evidence on every material branch of the issues tending to support the verdict. *Pittsburgh, C. C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

It is no objection that the verdict of the jury against a defendant's counterclaim be wholly contrary to the evidence, unless it is prejudicial to him; and it is not prejudicial if he has no right to plead the counterclaim set up by him as such. *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624.

If there is any evidence to support a material finding, it cannot be stricken from the special verdict or the answer set aside and a directly opposite one substituted for it. If a finding in a special verdict is against a decided preponderance of the evidence, the remedy is by motion for a new trial. *Ohlweiler v. Lohmann*, 82 Wis. 198, 52 N. W. 172.

The jury are not bound to blindly adopt the testimony of an interested witness merely because he is not directly contradicted by the testimony of other witnesses, and his character has not been impeached.¹

¹He may be contradicted by circumstances, as in *Dowling v. New York*, 4 N. Y. Week. Dig. 452.

But they must find in accordance with the testimony of a witness not a party who is unimpeached and uncontradicted and is corroborated by others, although slight discrepancies appear therein, and it is not clearly shown that he is not interested in the result. *Desh v. Barnes*, 13 N. Y. Week. Dig. 251.

8. Obedience to instructions.

The instructions of the trial court are the law of the case for the jury to obey and follow, and a verdict disobedient thereto is a verdict "contrary to law,"¹ and should be set aside,² even though the instruction disobeyed be itself erroneous in point of law.³

But refusal of the jury to accept and be controlled by an erroneous instruction of the court is not always regarded as necessarily being reversible error.⁴

¹The phrase "contrary to law," as ordinarily used in statutes providing for the granting of a new trial on the ground that the verdict is contrary to law, means "contrary to the instructions." *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534.

And a verdict for the plaintiff which, in disregard of a proper charge that upon one of the paragraphs of plaintiff's complaint their finding must be for the defendant, is based in part on that paragraph, is "contrary to law" and insufficient to support a judgment for the plaintiff. *Cincinnati, I. St. L. & C. R. Co. v. Darling*, 130 Ind. 376, 30 N. E. 416.

As to whether the court have power to correct a verdict objectionable in this respect, see *post*, Division XXV. § 11.

It needs no authority to say that the jury are bound to take the law from the court. This principle applies practically to every class of cases. And, when the law is announced by the court, it is the law of the case, until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either *sua sponte* by the judge, or on motion of the aggrieved party. Any other doctrine would lead to the utmost confusion. If the jury could question the charge of the judge the result would be that, in every case, the whole case, both law and facts, would go to the jury, under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterwards that he was in error. This could not be tolerated. It would degrade the judiciary and unhinge the whole system. So far as the jury are concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them. *Dent v. Bryce*, 16 S. C. 1-14. To the same effect, see: *Declez v. Save*, 71 Cal. 552, 12 Pac. 722; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L. R. A. 733, 5 So. 633; *Bushnell v. Chicago & N. W. R. Co.* 69 Iowa, 620, 29 N. W. 753; *Union P. R. Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. 312; *Kansas City, Ft. S. & M. R. Co. v. Furst*, 3 Kan. App. 265, 45 Pac. 128; *Rafferty v. Missouri P. R. Co.* 15 Mo. App. 559; *Jacobs v. Oren*, 30 Or. 593, 48 Pac. 431; *Hulett v. Patterson* (Pa.) 8 Cent. Rep. 83, 8 Atl. 917.

But to obtain a new trial upon that ground it must be made to appear that there was an instruction which was disregarded. It is not enough that a principle of law not embodied in an instruction was disregarded by the jury. *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534, and cases cited.

And the trial court is not justified in vacating the verdict on its own motion upon the ground merely that it is contrary to law, under a statute limiting its right to set aside the verdict to cases where there has been such plain disregard by the jury of the instructions of the court as to satisfy the court that the verdict was rendered under misapprehension of such instructions or under the influence of passion or prejudice; but the verdict must be so perceptibly in disregard of the instructions as to satisfy the court *upon its announcement and without the aid of argument and necessity of mature reflection*, that it is grossly erroneous or the result of passion or prejudice. *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195; *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126.

Nor does the statute justify such action on the part of the court, where the case was not withdrawn from the jury on any proposition and a

verdict was not directed by the court upon any matter. *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550.

^a*Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167; *Union P. R. Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. 312; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714 (a well-considered case); *Boyesen v. Heidebrecht*, 56 Neb. 570, 76 N. W. 1089; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 45 Pac. 743, 46 Pac. 407, and cases cited. Especially where the verdict is not only contrary to the instructions, but is also contrary to and inconsistent with special findings made by the jury. *Felton v. Chicago, R. I. & P. R. Co.* 69 Iowa, 577, 29 N. W. 618; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 45 Pac. 743, 46 Pac. 407. And this principle was recognized in *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630, although the verdict was held to be in fact responsive to the charge.

It matters not if the instruction disobeyed be itself erroneous in point of law; it is, nevertheless, binding upon the jury, who can no more be permitted to look beyond the instructions of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. The consequence of such a practice would be to fearfully impair the integrity of trials by jury. The question of law in theory supposed to have been settled by the court before the retirement of the jury, and upon the determination of which exceptions have been reserved, would not have been really determined at all (otherwise at least, than as mere abstract propositions of law), for the jury would have the right, in their retirement, to review the opinion of the court, and disregard his instructions, when they did not accord with their own notions of the law of the case, the law, while thus appearing to have been settled by the court in a particular way, would, in reality, have been determined by the jury in exactly the opposite way, and while the court would read the verdict as the finding of fact, arrived at by applying the law as the court had announced it, the verdict would, in reality, be but a reversal by the jury of the rulings of the court, for the errors in point of law, which the jury were of opinion that the court had committed. Such a practice should not be countenanced by an inquiry as to whether the court below or the jury were mistaken in point of law in the particular case. *Emerson v. Santa Clara County*, 40 Cal. 543.

^aA judgment will not be reversed if the verdict be the only one which could properly have been rendered. *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L. R. A. 674, 19 S. E. 521, and cases cited; *West Chicago Street R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Davis v. Threlkeld*, 58 Kan. 763, 51 Pac. 226; *Pittsburgh, C. C. & St. L. R. Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923.

A verdict, although not responsive to the instructions of the court, but so responsive to the issues presented by the pleadings as to enable the court to adjudicate the rights of the parties, was held sufficient in *Harkey v. Cain*, 69 Tex. 146, 6 S. W. 637.

9. Responsiveness to issues.

The verdict must be responsive to and answer all the issues made by the pleadings, and if it varies from the issues in a substantial manner, or if it be confined to a part only of the issues, no judgment can be rendered on the verdict.¹

And a special verdict should contain a finding by the jury upon every material fact in issue necessary to constitute the plaintiff's cause of action or the defendant's defense upon which there is evidence.²

But the verdict should not go outside the issues.³

And where the finding of one or more of the issues is decisive of the cause, and negatives, or renders immaterial, the other issues, the jury need not find as to the latter.⁴

'The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial manner, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleadings. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue. *Perea v. Colorado Nat. Bank*, 6 N. M. 1, 27 Pac. 322, citing *Patterson v. United States*, 2 Wheat. 222, 4 L. ed. 224. See also the following cases, where this principle is recognized and affirmed, although not always applied for the reason that the verdict is not open to the objection: *Johnson v. Higgins*, 53 Conn. 237, 1 Atl. 616; *Central R. Co. v. Freeman*, 75 Ga. 331; *Burke v. McDonald*, 2 Idaho, 646, 33 Pac. 49; *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009; *Pumphrey v. Walker*, 75 Iowa, 408, 39 N. W. 671; *Lancaster v. Lancaster*, 19 Ky. L. Rep. 577, 41 S. W. 34; *Gerrish v. Train*, 3 Pick. 124; *Moriarty v. McDevitt*, 46 Minn. 136, 48 N. E. 684; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Cannon v. Smith*, 47 Neb. 917, 66 N. W. 999; *Middleton v. Quigley*, 12 N. J. L. 352; *Thompson v. Button*, 14 Johns. 84; *Smith v. Smith*, 17 Or. 444, 21 Pac. 439; *Burdick v. Burdick*, 15 R. I. 165, 1 Atl. 289; *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *Messick v. Thomas*, 84 Va. 891, 6 S. E. 482.

But the verdict need not conclude formally or punctually in the words of the issue; if the point in issue can be concluded out of the finding the court shall work the verdict into form and make it serve according to the justice of the case. *Porter v. Rummary*, 10 Mass. 64.

Verdicts are to be favorably construed, and technical objections to the want of form in wording them disregarded. If it can be inferred from the verdict that the jury have found the point in issue, it is the duty of the court to work and mould it into form according to the real justice of the case. *Picket v. Richet*, 2 Bibb, 178.

A verdict for plaintiff suing upon a note payable in gold coin should so find, and failure to do so is error. *Irvin v. Garner*, 50 Tex. 48.

But a verdict is not bad for not passing upon a question made by the evidence alone, and not raised by the pleadings or brought to the at-

tention of the jury by an instruction. *Semple v. Crouch*, 8 Mo. App. 593, Appx.; *Price v. Bell*, 88 Ga. 740, 15 S. E. 810.

And the failure of the jury to find upon issues raised upon a counterclaim in defendant's answer is not error available to plaintiff. *North Star Boot & Shoe Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833.

^a*Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *First Nat. Bank v. Peck*, 8 Kan. 660; *Miller v. Shackelford*, 4 Dana, 264; *Kintz v. McNeal*, 1 Denio, 436; *Hilliard v. Outlaw*, 92 N. C. 266; *Lane v. Lenfest*, 40 Minn. 375, 42 N. W. 84; *Walsh v. Bowery Sav. Bank*, 10 N. Y. Civ. Proc. Rep. 32; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Stiles v. Estabrook*, 66 Vt. 535, 29 Atl. 961; *Ward v. Busack*, 46 Wis. 408, 1 N. W. 107; *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180. But see *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956, holding that under the peculiar rule which prevails in Indiana a special verdict is not ill, even though it may not cover all the issues in the cause. See also, as to the Indiana rule, Elliott, Appellate Procedure, § 759.

It is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found. *Suydam v. Williamson*, 20 How. 427, 15 L. ed. 978.

It may be said that there is a more cogent reason for the rule than this. It is the right of the parties to have the jury pass upon all of the facts controverted by the pleadings, and when they have omitted to do this, however clear and undisputed the evidence upon the issues not found, the court cannot render judgment without usurping in part the functions of the jury, and thereby render judgment infringing a right guaranteed by the Constitution and laws. *Moore v. Moore*, 67 Tex. 293, 3 S. W. 284.

But it is not necessary that matters should be proved precisely as alleged; it is sufficient if the verdict sustain the substance of the issues. *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L. R. A. 341, 30 N. E. 519.

A special verdict need find only such facts as are alleged in the pleadings upon one side and denied upon the other. *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646.

There need be no finding upon immaterial facts, nor upon facts proved but not within the issues. *Johnson v. Putnam*, 95 Ind. 57.

It need not contain facts admitted by the pleadings. *Barto v. Himrod*, 8 N. Y. 485, 59 Am. Dec. 506; *Burton v. Boyd*, 7 Kan. 17.

So, also, any fact which is established by undisputed evidence on the trial may be considered as a part of the special verdict, for the purpose of rendering judgment on such verdict. *Faricell v. Warren*, 76 Wis. 527, 45 N. W. 217; *Murphrey v. Weil*, 89 Wis. 146, 61 N. W. 315. But *Stephenson v. Chappell*, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482, holds a special verdict to be fatally defective if it does not find all the facts put in issue by the pleadings, although the existence of the facts not found may be established by uncontroverted evidence.

And failure to pass on an issue in support of which there is no evidence whatever is not error. *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69.

A special verdict in an action in which a money judgment only is sought is sufficient if it finds such facts as to leave nothing for the court to do except to make a mathematical calculation. *Hoppes v. Chapin*, 15 Ind. App. 258, 43 N. E. 1014.

**Swan v. Smith*, 13 Nev. 257; *Bunnell v. Bunnell*, 93 Ind. 595; *Deering v. Halbert*, 2 Litt. (Ky.) 291.

The verdict cannot contradict or be at variance with express admissions contained in the pleadings. *Brayton v. Delaware County*, 16 Iowa, 44; *Watts v. Greenlee*, 13 N. C. (2 Dev. L.) 87.

But a verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings. *Baum Iron Co. v. Union Sav. Bank*, 50 Neb. 387, 69 N. W. 939. See, also, *Bushnell v. Crooke Min. & Smelting Co.* 12 Colo. 247, 21 Pac. 931, where the rule was sought to be invoked, but was denied because the verdict was not open to the objection.

**Beers v. Flock*, 2 Ind. App. 567, 28 N. E. 1011; *French v. Hanchett*, 12 Pick. 15; *White v. Bailey*, 10 Mich. 155; *Law v. Merrills*, 6 Wend. 268; *Atlantic, T. & O. R. Co. v. Purifoy*, 95 N. C. 302; *Martin v. Clinton Bank*, 14 Ohio, 187; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *Everit v. Walworth County Bank*, 13 Wis. 419.

Thus, a verdict in an action of replevin finding ownership in plaintiff is sufficient, without a finding as to right of possession, as the finding of ownership carries with it the right of possession, in the absence of evidence to the contrary. *Cassel v. Western Stage Co.* 12 Iowa, 47. So held, too, of a verdict finding plaintiff entitled to possession of the property, but silent as to the issue of ownership. *Fitzer v. McCannan*, 14 Wis. 63. Contra, *Phipps v. Taylor*, 15 Or. 484, 16 Pac. 171.

So error, if any, in failing to find upon issues of fact not submitted to the jury is not prejudicial to plaintiff, where one complete defense was found in favor of defendant, so that plaintiff could not have recovered in any event. *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

And a general verdict in favor of a wife suing for divorce and alimony on the ground of cruelty will not be set aside because the jury did not find whether or not there was condonation by cohabiting together, where in view of defendant's acts and conduct up to the commencement of the action there can be no possible ground to claim condonement. *Morrison v. Morrison*, 14 Mont. 8, 35 Pac. 1.

10. Certainty as to prevailing party.

A verdict from which it is impossible to ascertain whether the jury intended to award a recovery for plaintiff or defendant is defective in substance and no valid judgment can be rendered thereon.¹

¹*Baughan v. Baughan*, 114 Ind. 73, 15 N. E. 466, 17 N. E. 181.

Thus, a verdict against the wife alone in an action against a husband and wife on a joint contract relating to her separate estate, in which they plead jointly, is void. *Magruder v. Belt*, 7 App. D. C. 303. And in *Porter v. Mount*, 45 Barb. 422, a verdict against the wife alone in an action against husband and wife as joint debtors, each answering separately, was held a mistrial, although a discontinuance as to the husband was permitted on plaintiff's motion in order to retain the verdict.

So, where two or more defendants are sued jointly for a joint tort, each of whom answers separately, denying the tort as to him, the verdict must expressly declare in favor of or against each, and a general verdict for plaintiff against one defendant only will be set aside at plaintiff's instance as being no verdict at all as to the defendant not named; and the fact that plaintiff failed to ask for its correction at the time it was announced does not raise the presumption that the issue as to the defendant not so named in the verdict was abandoned at the trial. *Rankin v. Central P. R. Co.* 73 Cal. 93, 15 Pac. 57.

Train v. Taylor, 51 Hun, 215, 4 N. Y. Supp. 492, holds that a verdict against one and in favor of another defendant cannot be rendered in an action for conspiracy.

But *Houston v. Ladies' Union Branch Asso.* 87 Ga. 203, 13 S. E. 634, holds that a general verdict for plaintiff in an action against two defendants sued jointly is a finding against both, and is sufficiently certain.

But where two or more defendants are sued severally and individually, the verdict may find against any one or more of them, omitting all reference to the others, and a valid judgment entered upon it for plaintiff. *Kaufman v. People's Cold Storage & Warehouse Co.* 10 Misc. 53, 30 N. Y. Supp. 831; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *French v. Cresswell*, 13 Or. 418, 11 Pac. 62 (holding that a verdict for plaintiff in which a line had been drawn across the name of one of the defendants was good against the other defendant). In *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955, an action of tort against three persons sued as partners in which two of them filed pleas of nonpartnership, and the whole case was tried together, a verdict against the three was sustained as a finding that they were all liable as partners, and equivalent to a verdict against the partnership; but inasmuch as the proof showed that but one of the partners was liable, the appellate court, applying the rule that for torts partners may be jointly and severally liable, affirmed the judgment as to the guilty partner, and reversed as to the others with direction to dismiss.

So, also, the verdict may omit all reference to a defendant as to whom there is no issue to be tried. *Etter v. Hughes* (Cal.) 41 Pac. 790 (where the defendant not named had admitted his liability); *Price v. Bell*, 88 Ga. 740, 15 S. E. 810; *Shattuck v. North British & Mercantile Ins. Co.* 19 U. S. App. 215, 58 Fed. Rep. 609, 7 C. C. A. 386; *Baker v. Thompson*, 89 Ga. 488, 15 S. E. 644 (where plaintiff had disclaimed his right to recover against the defendant not named); *Columbia Phosphate Co. v. Farmers' Alliance Store*, 47 S. C. 358, 25 S. E. 116 (where plaintiff had dismissed as to the defendant not named).

Nor is the verdict made uncertain by the fact that in finding for one party or the other the jury have used the plural instead of the singular, where there is in fact but one party. *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881; *Houston & T. C. R. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083; *McGill v. Rothger*, 45 Ill. App. 511. Or that in finding for plaintiff they have used the singular instead of the plural, although there are several plaintiffs, and that fact is elsewhere apparent. *Missouri, K. & T. R. Co. v. Jamison*, 12 Tex. Civ. App. 689, 34 S. W. 674; *Daft v. Drew*, 40 Ill. App. 266; *Hartford County Comrs. v. Wise*, 71 Md. 43, 18 Atl. 31 (where the names of the plaintiffs appeared in full in the caption of the verdict); *Henry v. Halsey*, 5 Smedes & M. 573.

So held, also, of a verdict against "defendant" in an action against partners, the jury proceeding on the theory that the defendant was a corporation. *Davis v. Shuah*, 136 Ind. 237, 36 N. E. 122. *See* even though they plead separately. *Waddingham v. Dickson*, 17 Colo. 226, 29 Pac. 177. See also *Union P. R. Co. v. Smith*, 59 Kan. 80, 52 Pac. 102, where a verdict in favor of plaintiff in an action against a corporation and the receivers in entire and exclusive control of the corporate property, without naming either defendant, was construed as a verdict against the receivers alone, a judgment thereon to be entered against such receivers only.

A verdict entitled in the name of the plaintiff against one of defendants by name, and designating numerous other defendants as "*et al.*," was held good against all those shown by the record to be the codefendants of the one specifically named in the verdict, in *Knox v. Gregorious*, 43 Kan. 26, 22 Pac. 981.

And in *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 431, an action against two defendants, one of whom did not appear or answer, a verdict for the plaintiff was upheld as good against the defendant who appeared and defended, notwithstanding that the caption named the other defendant as sole defendant.

11. Certainty as to finding or recovery.

The verdict must with reasonable certainty show what finding or recovery the jury intend to award;¹ and if a verdict, uncertain in this respect when returned, cannot be made certain by the aid of and reference to the record, it is fatally defective.²

¹Thus, a verdict in an action for the recovery of personal property, which does not describe it except as to quantity, with no description as to location to afford the means of identification, is insufficient. *Lockhart v. Little*, 30 S. C. 326, 9 S. E. 511.

But a verdict assessing the value of the "property taken," without describing it, is sufficient if reference to the complaint makes certain what property is meant. *Hobbs v. Clark*, 53 Ark. 411, 9 L. R. A. 526, 14 S. W. 652.

So held also of a verdict in an action to obtain specific performance of contract for the conveyance of land. *Bunnell v. Bunnell*, 93 Ind. 595.

A verdict finding "no cause of action" will support a judgment for defendant. *Felter v. Mulliner*, 2 Johns. 181; *Glazc v. Keith*, 55 Neb. 593, 76 N. W. 15 (holding that a verdict in a justice's court that the jury find that "plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account" is a verdict for defendant). Not so, however, in an action of replevin, according to *Ford v. Ford*, 3 Wis. 399. And *Cattell v. Despatch Pub. Co.* 88 Mo. 356, holds that a verdict of "no cause for action" is informal; and where the jury decline to change it, at the court's suggestion, to one "for the defendant," it is insufficient to support judgment for defendant.

In Colorado, a statute allows an action of replevin to proceed as one for damages, where the property has not been taken in on the writ; and a verdict in such a case, finding the issues for the plaintiff and assessing damages, is sufficient. *Witcher v. Watkins*, 11 Colo. 548, 19 Pac. 540.

³*Moriarty v. McDevitt*, 46 Minn. 136, 48 N. W. 684. See also the following cases, where this rule is recognized and affirmed, although not always applied because the verdict is held not to be uncertain within the rule: *Seifert v. Holt*, 82 Ga. 757, 9 S. E. 843; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Garrett v. State ex rel. Huntsinger*, 149 Ind. 264, 49 N. E. 33; *McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 340, 16 N. E. 787; *Richardson v. McCormick*, 47 Iowa, 80; *Smith v. Cornett*, 18 Ky. L. Rep. 818, 38 S. W. 689; *McCaskill v. Currie*, 113 N. C. 313, 18 S. E. 252; *Roy v. Missouri, K. & T. R. Co.* (Tex. Civ. App.) 32 S. W. 72.

It is not usually difficult to make a verdict express the conclusions or findings of the jury; and while it may be liberally aided by the contents of the record, and enforced when, if so aided, there can be no uncertainty as to intention of the jury, mere conjecture cannot be resorted to. *Gulf, C. & S. F. R. Co. v. Hathaway*, 75 Tex. 557, 12 S. W. 999.

Thus, in ejectment, a verdict finding for plaintiff, whether as to the whole of the land claimed, or a part only, must be certain in itself, or must refer to some certain standard by which to ascertain the land so awarded; otherwise it will be too uncertain to support a judgment. *Messick v. Thomas*, 84 Va. 891, 6 S. E. 482 (upholding a verdict which awarded to plaintiff "the whole of the premises described in the declaration," which, in accordance with a statute requiring the declaration to describe the premises "with convenient certainty so that from that description possession may be delivered," did so describe them); *Benn v. Hatcher*, 81 Va. 25, 59 Am. Rep. 645 (holding as immaterial a variance between the declaration and the verdict, as to the location of the land with reference to a certain highway, where in all other respects they agreed as to the description); *Slocum v. Compton*, 93 Va. 374, 25 S. E. 3; *Colorado Cent. Consol. Min. Co. v. Turck*, 4 U. S. App. 290,

50 Fed. Rep. 888, 2 C. C. A. 67; *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841. And for other illustrations of verdicts held to be defective for uncertainty in not sufficiently identifying the land awarded, see: *McCullough v. East Tennessee, V. & G. R. Co.* 106 Ga. 275, 32 S. E. 97; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Harris v. Johnson*, 19 Ky. L. Rep. 1865, 44 S. W. 948; *Robertson v. Drane*, 100 Mo. 273, 13 S. W. 405; *DeClemente v. Winstanley*, 8 Misc. 45, 28 N. Y. Supp. 513; *Clark v. Clark*, 7 Vt. 190.

In Michigan a statute requires the verdict in an action of ejectment, if for plaintiff, to specify the right or estate established by him; and a verdict which does not so specify the right or estate will not support a judgment for plaintiff. *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422.

And in Florida a similar statute requires the verdict to state the quantity of the estate of the plaintiff, and to describe the lands by its metes and bounds, by the number of the lot, or by other certain description; and a verdict for plaintiff which does not find the quantity of the estate of the plaintiff sued for is insufficient. *Lungren v. Brownlie*, 22 Fla. 491. But a verdict rendered in compliance with the requirements of the statute need not expressly declare the defendant guilty. *Russell v. Marks*, 32 Fla. 456, 14 So. 40.

But on the trial of an adverse claim to a mining claim instituted under U. S. Rev. Stat. § 2326, regulating the proceedings to be had on such claims, the only question presented for determination is the priority of right to purchase the fee, the fee itself to the land still remaining in the general government; and a verdict simply "for plaintiff" is sufficient. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

In boundary line suits, if the land in dispute is not described by metes and bounds in plaintiff's petition, a general verdict for plaintiff should describe it by metes and bounds. *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77; *Bennett v. Seabright* (Tex. Civ. App.) 32 S. W. 1048. See also *Reed v. Cavett*, 1 Tex. Civ. App. 154, 20 S. W. 837.

A verdict generally "for the plaintiffs" in an action of trespass is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon the question of title where it was distinctly put in issue. *McLaughlin v. Kelly*, 22 Cal. 211.

A verdict in an action for the location of a proposed highway, finding in favor of the establishment of the highway "as prayed for by the plaintiffs in their petition," is not defective for not describing the proposed highway where the beginning, terminus, course, distance, and width of the highway are fully and accurately set forth in the petition. *Thayer v. Burger*, 100 Ind. 262.

A verdict finding a certain amount of usury is equivalent to finding in favor of the plaintiff as to the remainder of the debt, which amount can be made certain from the pleadings. *Small v. Hicks*, 81 Ga. 691, S. E. 628.

In Alabama, a statute authorizes a defendant, in an action to enforce a

mechanic's lien, to put in issue the fact of indebtedness, the existence of the lien, or to interpose any other appropriate defense, and if the verdict for the plaintiff ascertains the existence of the lien, the proper judgment to enforce it follows; but if the verdict is for the plaintiff on the issue of indebtedness only, judgment follows for the amount thereof as in other cases. And in such an action on a complaint containing the common counts and a special count, in which the structure and improvements sought to be charged are described with sufficient certainty, issue being joined on the pleas of payment and set-off, with the general issue, a verdict finding "the issues in favor of the plaintiff, \$100," though informal, is sufficient to support a judgment declaring a lien in his favor for that sum on the structure and improvements. *Bedsole v. Peters*, 79 Ala. 133.

12. Stating amount of recovery; assessing damages.

A verdict in an action in which a money judgment is sought, whether by way of liquidated or unliquidated damages, which does not state specifically the amount to which the jury deem the plaintiff entitled, is not a verdict on which a valid judgment can be entered.¹ Not so, however, of a verdict which finds such facts as leave nothing for the court to do but make a simple mathematical calculation,² or of a verdict in an action in which the amount is not in issue and the verdict is unobjectionable in other respects.³

¹*Washington v. Calhoun*, 103 Ga. 675, 30 S. E. 434; *Fort Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242; *Bartle v. Plane*, 68 Iowa, 227, 26 N. W. 88; *Louisville & N. R. Co. v. Hartwell*, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041; *Miller v. Cappel*, 39 La. Ann. 881, 2 So. 807; *Gaither v. Wilmer*, 71 Md. 361, 5 L. R. A. 756, 18 Atl. 590; *Fryberger v. Carney*, 26 Minn. 84, 1 N. W. 807; *Burghart v. Broun*, 60 Mo. 24; *Gerhab v. White*, 40 N. J. L. 242; *Van Benthuyzen v. De Witt*, 4 Johns. 213; *Murray v. King*, 30 N. C. (8 Ired. L.) 528; *Ames v. Sloat*, Wright (Ohio) 577; *Neville v. Northcutt*, 7 Coldw. 294. But that a verdict for plaintiff for the full amount claimed is sufficient where the complaint and testimony show what such amount is, see: *Goodman v. Steinfeld*, 20 Misc. 224, 45 N. Y. Supp. 1141; *Newton v. Ker*, 14 La. Ann. 715. So held also of a verdict for plaintiff for the debt in his petition mentioned. *Brannin v. Foree*, 12 B. Mon. 506. And *Olcott v. Hanson*, 12 Mich. 452, held that the jury properly returned a verdict, as directed by the court, for plaintiff for the sum stated by counsel for plaintiff as the amount claimed, and agreed to by the foreman as the amount the jury found, after counsel for defendant had objected to the jury retiring to find the damages, where they had returned a sealed verdict for the plaintiff the full amount claimed by him on the note sued on, and to the court's question as to what amount they assessed the foreman replied that they did not have the note and did not remember the amount, but that it was the amount claimed by plaintiff.

Thus a verdict in an action upon a breach of a bond for title to land must return *in solido* the total amount of the value of the land and interest, as required by statute. *Gibson v. Carreker*, 82 Ga. 46, 9 S. E. 124.

And the rule is applicable to a special verdict as well as a general verdict. *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591, and cases cited. But failure of a special verdict to assess the amount of damages sustained by plaintiff does not prevent the entry of a judgment thereupon for plaintiff, where the damages are assessed in the formal conclusion of the verdict. *Cole v. Powell*, 17 Ind. App. 438, 46 N. E. 1006. So, also, a special verdict in an action on an insurance policy containing a finding that arbitrators, to whom the amount of the loss had been submitted by agreement of the parties, had awarded a certain amount, is not uncertain where the finding conforms to an allegation of the petition that the question of loss or damage had been so left to arbitration, which defendant admits, but denies the award, although the verdict contains no formal conclusion assessing damages. *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468.

It has for a long time been the settled rule of practice in Missouri, that where a petition sets up separate claims of action, stated in separate counts, with a separate demand for damages in each count, a general verdict for a general sum is improper and is a good cause for arresting the judgment. But this rule does not apply where there is really but one cause of action, stated in a different manner in different counts, so as to meet any possible state of facts that may be shown by the evidence. In such case, a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for plaintiff is sufficient. *Silcox v. McKinney*, 64 Mo. App. 330, and cases cited.

A verdict "for defendant" simply is proper in form, where the jury finds against plaintiff on her claim and also against defendant on a counterclaim. *Phillips v. Lewis*, 12 App. Div. 460, 42 N. Y. Supp. 707.

The only finding essential to the validity of a verdict, where no offset is pleaded, according to *Clemmons v. Clemmons*, 68 Vt. 77, 34 Atl. 34, is the balance due, without stating the sums allowed the respective parties. In Missouri, however, the jury should make affirmative findings as to counterclaims set up by defendant. *Henderson v. Davis*, 74 Mo. App. 1.

Defendant is not injured by the failure of the jury, in an action of replevin, to assess the value of the property on finding for plaintiff, as required by statute, where the property is in the plaintiff's possession. *Dykes v. Clarke*, 98 Ala. 657, 13 So. 690; *Busching v. Sunman*, 19 Ind. App. 683, 49 N. E. 1091; *Clafin v. Davidson*, 21 Jones & S. 122. So held, also, of failure to assess either the value of the property or damages. *Coit v. Waples*, 1 Minn. 134, Gil. 110. But it may properly assess damages for the detention. *Leonard v. Maginnis*, 34 Minn. 506, 26 N. W. 733.

But a verdict for plaintiff in an action to recover a way by necessity is not insufficient because of a failure to find specifically the amount of damages sustained by him. *Miller v. Richards*, 139 Ind. 263, 38 N. E. 854.

And in an action of tort for treble damages allowed by statute it is immaterial whether the jury find treble damages in their verdict, or find the actual loss or damage to plaintiff and the court enters judgment for three times that amount, the statute being silent as to which mode should be pursued. *Galvin v. Gualala Mill Co.* 98 Cal. 268, 33 Pac. 94.

In Michigan, a statute requires the jury in an action of libel and slander to specify the amount awarded for damages to feelings separately from the amount awarded for other damages. But this statute will not avail to overcome a verdict not so separating the damages where the case was pending when the act went into effect, and it was apparently unknown to both court and counsel at the time of trial. *Hewitt v. Morley*, 111 Mich. 187, 69 N. W. 245.

Nor is defendant, in an action for malicious prosecution commenced before a Missouri statute requiring the verdict to state separately the actual and exemplary damages went into effect, prejudiced by the conformity of the verdict to such requirements, even if the statute does not apply to the case. *Hilbrant v. Donaldson*, 69 Mo. App. 92.

In Alabama, a statute requires that a verdict for plaintiff, in an action for ejectment in which there has been made the suggestion of adverse possession by the defendant, must also state whether the suggestion of adverse possession be true or false; and if false the jury must assess damages as in ordinary cases; but if true they must assess the value, at the time of trial, of the permanent improvements by defendant, or those whose estate he has, and also ascertain the value of the lands, and of the use and occupation thereof, not including the increased value by reason of the improvements, judgment to go against defendant for the excess, if any, of the value of the use and occupation over that of the permanent improvements. And a verdict which, after finding the suggestion of adverse possession and permanent improvements to be true assesses the value of the latter, on their excess over the rents, must also assess the value of the lands without the improvements. *Coltart v. Moore*, 79 Ala. 361.

**Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *Fort Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242 (*dictum*); *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844; *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591; *Wells v. Cox*, 1 Daly, 515.

Thus, a verdict in an action for personal injuries, that the jury find for plaintiff and assess his damages at a specified amount, "including medical attention and other incidental expenses," is not bad for uncertainty, where the evidence and charge show what such "other incidental expenses" were. *Missouri, K. & T. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528, 32 S. W. 588.

A verdict for a specified amount and attorneys' fees is not void for uncertainty, when the contract in suit provides for attorney's fees at a fixed per cent. *Buchanan v. Townsend*, 80 Tex. 534, 16 S. W. 315.

And a special finding that defendant is indebted to plaintiff for the face of the notes in suit, with interest, "less the credits" will be deemed

to refer to credits indorsed on the notes, and is sufficiently definite to support a judgment for plaintiff, notwithstanding defendant claims that other payments have been made which are not credited on the notes. *Roberts v. Roberts*, 122 N. C. 782, 30 S. E. 347.

But a special verdict which neither specifically assesses damages, nor so states the facts as to leave nothing for the court in the ascertainment of the damages further than mere computation from the facts found, is fatally defective. *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

*No doubt the more orderly and regular method is to have the amount always stated in the verdict; but a statute requiring that it be done never was intended to render a verdict that failed to state the amount a nullity, in a case where the sole issue was plaintiff's right to recover anything, and the amount was admitted by the pleading. *Redmond v. Weismann*, 77 Cal. 423, 20 Pac. 544 (sustaining a verdict simply finding for plaintiff, the only issue being plaintiff's right to recover at all); *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559 (where the amount was not in dispute, the court charging the jury the precise sum the plaintiff was entitled to if they found in his favor); *Buckley v. Lord*, 24 How. Pr. 455 (amount of claim admitted by counsel); *Joseph v. Mady Clothing Co.* 13 Mont. 195, 33 Pac. 1 (where the only issue was the truth of the allegations of fraud by which it was sought to show that the debt should be considered as due for the purpose of suing on it); *English v. Goodman*, 3 N. D. 129, 54 N. W. 540; *Metzger v. Huntington*, 51 Ill. App. 377 (an action upon a judgment in which defendant pleaded in abatement that he had not been served with process). See also *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546, where the court after a default judgment assessed damages and rendered final judgment, and thereafter granted leave to plead, but denied a motion to set aside the default, allowing it to stand as security until the trial of the issues raised by the pleas, in default of proof to sustain which the judgment was to stand, and a verdict finding the issues for plaintiff, without assessing damages, was upheld.

So held also of a verdict rendered at the trial of an ordinary claim case, since the issue is simply whether or not the property is subject to the execution. *Lamar v. Coleman*, 88 Ga. 417, 14 S. E. 808.

Rendering a verdict against a claimant of attached property without finding the value of the property and that the claimant has failed to establish his claim, although erroneous, was held not to be prejudicial where there is no contention as to value, in *Peterson v. Wright*, 9 Wash. 202, 37 Pac. 419.

And a verdict "for defendant for its costs" is not void as failing to specify the amount to be recovered, as required by statute, since where the jury found nothing for either plaintiff or defendant, the verdict necessarily being for defendant, they could not specify the amount of the recovery, and the words "for its costs" are but harmless surplusage. *Electric Improv. Co. v. San José & S. C. R. Co.* (Cal.) 31 Pac. 455.

But a verdict merely for "the defendant," where there is an issue whether

he is liable for the whole or one half of the amount of a note guaranteed, is not sufficient to authorize a judgment, although a special finding establishes the amount due from the maker of the note to the plaintiff. *Lamb v. Briggs*, 22 Neb. 138, 34 N. W. 217.

13. — allowing more than demanded.

The verdict should not award a greater amount of damages than is demanded.¹ But the objection is waived unless taken before entry of judgment.²

It is no objection, however, that the verdict exceeds the amount indorsed on the writ if it corresponds with the amount demanded or claimed in the declaration.³

¹*Wathen v. Byrne*, 11 Ky. L. Rep. 495, 12 S. W. 197. And *Georgia R. & Bkg. Co. v. Crawley*, 87 Ga. 191, 13 S. E. 502, holds that a new trial should be granted upon a verdict for a larger amount than is claimed in the declaration, where there is no amendment or offer to amend to recover the excess, and no order is made requiring plaintiff to write off the excess, although such excess is merely the amount of interest upon the damages claimed.

But *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553, holds that a verdict for more than the amount of damages claimed in the *ad damnum* clause of the declaration will not require reversal, as that clause is merely formal. And *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359, holds that the mere fact that a verdict for plaintiff is for \$5 more than he claimed in his petition does not justify the conclusion that the verdict is the result of the jury's passion or prejudice.

In *Schultz v. Third Ave. R. Co.* 89 N. Y. 242, where the complaint contained several counts all of which referred to the same cause of action, and in reality alleged but one tort in different forms, it was held that the allegation at the end of each count of damages sustained might be disregarded; and a verdict, although for more than any one of the allegations of damages, but not exceeding the general prayer for judgment, was upheld. But in *McIntire v. Clark*, 7 Wend. 330, an action to recover for services the value of which was certified at a specified sum, in which the declaration alleged damages on a special contract in the sum certified in the first count, and in the second count demanded the same sum for the same services on a *quantum meruit*, a verdict for more than either count, but less than the general prayer, was set aside.

²*Brown v. Schoonmaker*, 10 Rep. 745. In *Brown v. Reed*, 81 Me. 158, 16 Atl. 504, the court, in disposing of the objection that the verdict exceeded the sum declared for in the writ, said: "That is undoubtedly so, if a recovery by the plaintiff is to be limited to such items as are with strict technicality declared for. But such construction will exclude the allowance of items which, though not accurately declared for, were presented in evidence and considered by the jury without any objection, as far as the writ and declaration are concerned, on the part

of the defendant. He neither demurred to the writ, nor objected to the evidence in support of any of the items, nor excepted to any rulings in regard to them. On motion for verdict this objection comes too late." See also *post*, Division XXVI. § 3.

¹*Williams v. Williams*, 11 Smedes & M. 393, and cases cited.

14. — allowing excessive damages.

A verdict allowing damages so excessive and disproportioned as to warrant the inference that the jury have been swayed by prejudice, passion, preference, partiality, corruption, ignorance, or any other improper motive, is invalid, and should not be allowed to stand.¹

Not so, however, where the elements of prejudice, passion, etc., are wanting, the objection being that the excess is unsupported by the evidence, and a remittitur for such excess is entered.²

¹*Harrison v. Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560; N. Y. Code Civ. Proc. § 999; *Coxhead v. Johnson*, 20 App. Div. 605, 47 N. Y. Supp. 389; *Schaffer v. Baker Transfer Co.* 29 App. Div. 459, 51 N. Y. Supp. 1092; *Libby v. Towle*, 90 Me. 262, 38 Atl. 171; *Musser v. Lancaster City Street R. Co.* 15 Pa. Co. Ct. 430; *Texas & N. O. R. Co. v. Demille* (Tex. Civ. App.) 41 S. W. 147. (Aff'd on other grounds in 42 S. W. 540.) See also the following cases where this principle was recognized, but held inapplicable to the verdicts under consideration. *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. Rep. 174; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966; *Gurley v. Missouri P. R. Co.* 104 Mo. 211, 16 S. W. 11; *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 27 S. W. 453; *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359; *Lucier v. Larose*, 66 N. H. 141, 20 Atl. 249; *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286; *Ray v. Lake Superior Terminal & Transfer R. Co.* 99 Wis. 617, 75 N. W. 420; *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826.

²Although the court has no right to substitute its own estimate of damages for that of the jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict, and to order a new trial unless plaintiff consents to reduce the verdict to such amount. *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79. See also *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 344, 10 S. W. 207; *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359, where it is held that in an action *ex contractu* (and said that even in an action *ex delicto*) a verdict erroneous because of excessive damages awarded may be cured by a remittitur, when it does not appear that such verdict was the result of passion or prejudice.

As to what are excessive verdicts, and what are not, see note to *Standard Oil Co. v. Tierney* (Ky.) 14 L. R. A. 677.

As to the power of the appellate court to interfere with a verdict for excessive damages, see note to *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 27 S. W. 453.

15. — allowing inadequate damages.

The court may in a proper case, of its own motion, vacate a verdict and order a new trial when it deems the amount awarded by the jury inadequate.¹

And a verdict in an action to recover damages capable of ascertainment by some standard of measurement, but which awards an amount not only not commensurate with, but glaringly disproportioned to, that justified by the evidence, is invalid.²

But where there is no such standard of measurement, and the damages are unliquidated, and the amount to be awarded is discretionary with the jury, a verdict cannot be deemed objectionable for inadequacy merely because, in the opinion of the court, more might have been awarded, but the verdict must be so small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation.³

¹*Fort Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 173, 68 N. W. 115.

²*Georgia Southern & F. R. Co. v. Jones*, 90 Ga. 292, 15 S. E. 824; *Greenlee v. Schoenheit*, 23 Neb. 669, 37 N. W. 600; *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752; N. Y. Code Civ. Proc. § 999; *Meyer v. Hart*, 23 App. Div. 131, 48 N. Y. Supp. 904; *Morrissey v. Westchester Electric R. Co.* 30 App. Div. 424, 61 N. Y. Supp. 945. See also cases in note to *Benton v. Collins* (N. C.) 47 L. R. A. 33.

So held of a verdict for a sum greatly less than the damages suffered as shown by the evidence in writing, which was practically undisputed. *Porter v. Sherman County Bkg. Co.* 36 Neb. 271, 54 N. W. 424.

And of a finding for plaintiff in an action of ejectment, but allowing him no damages, where there was no question as to his being entitled to mesne profits, and their value was fixed by the testimony. *Duncan v. Jackson*, 16 Fla. 338.

And of a verdict for one half the amount which the proof of the value of the services sued for justified the jury in finding, there being no evidence to warrant the finding of the less amount. *Shropshire v. Dorey*, 25 Tex. 127.

And of a verdict in an action for wages *quantum meruit*, finding an amount less than that fixed by any witness in the case as the value of the services rendered. *Howe v. Lincoln*, 23 Kan. 468.

But the fact that the jury found a verdict for a less sum than that fixed by any of the witnesses as the amount of damages, in an action for breach of contract, is no objection where the amount of the damages was merely a matter of opinion. *Brewer v. Tyingham*, 12 Pick. 547.

And in actions on contract, in which the damages may be more or less a matter of calculation, although the plaintiff may be *prima facie* enti-

tled to a full measure of damages, it is a legitimate element of consideration for which the jury are at liberty to diminish the damages that the actual amount has been affected by his conduct or that of his agent; but if they do so unreasonably and arbitrarily, the verdict may be successfully attacked as against evidence. *Wilson v. Hicks*, 26 L. J. Exch. N. S. 242.

A verdict for one cent in favor of the plaintiff in an action for trespass for taking property from his premises will be set aside and a new trial granted, as the jury are bound to find damages, at least to the value of the property taken. *Porteous v. Hazel*, Harp. L. 332.

But the rule has been held to be different with reference to a mere naked trespass. Thus, the court will not grant a new trial in an action sounding in damages, as trespass, etc., because the jury assess only half a farthing for damages, as in such a case it is in their power to assess such damages as they please. *Marsham v. Buller*, 2 Rolle Rep. 21.

The judgment of witnesses as to value, however, is not, as a matter of law, to be accepted by the jury in place of their own; and a party against whom damages are assessed by a jury cannot complain that such damages have been placed at a lower sum than fixed by the witnesses. *Powell v. Missouri P. R. Co.* 59 Mo. App. 335.

Statutes, however, sometimes forbid vacating a verdict and granting a new trial for smallness of damages in any action for injury to the person or reputation, or in any action where the damages equal the actual pecuniary injury to the plaintiff. Thus, in Ohio (Ohio Rev. Stat. § 5306), *Gentile v. Cincinnati Street R. Co.* 4 Ohio N. P. 9. But such a statute has no application to special damages, or to the assessment of actual pecuniary damages resulting directly from the wrong. And if the damages can be measured, and the injury is such as to demonstrate that the proof and the law have been disregarded, the verdict should not be allowed to stand. *Ray v. Jeffries*, 86 Ky. 367, 5 S. W. 867.

But such a state statute can have no force or application in a case in a Federal court sitting in that state. *Hughey v. Sullivan*, 80 Fed. Rep. 72.

**Carter v. Wells F. & Co.* 64 Fed. Rep. 1005; *Allison v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 29 S. W. 425; *McDermott v. Chicago & N. W. R. Co.* 85 Wis. 102, 55 N. W. 179.

Or that there must have been mistake or oversight in failing to take into consideration the proper elements of damage in assessing the amount of recovery. *Berry v. Lake Erie & W. R. Co.* 72 Fed. Rep. 488.

Or the damages must be such as to induce the conviction that the jury have shrunk from deciding the issue submitted to them. *Lee v. George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107.

Or that there were some objectionable compromises. *O'Shea v. M'Lear*, 15 N. Y. Civ. Proc. Rep. 69, 1 N. Y. Supp. 407.

As a general rule the injury inflicted by a libel or a slander is purely personal, and not susceptible of measurement by any standard. Libel and slander cases, therefore, fall within that class of cases in which a ver-

dict will not be set aside for inadequacy unless it is such as to shock the understanding and show bias, passion, or prejudice; and some of the cases, notably the early English ones, seem to have adopted the more stringent rule that a verdict cannot be set aside for inadequacy unless there has been some mistake of law by the court, or in calculation by the jury. See for instance, *Rendall v. Hayward*, 5 Bing. N. C. 424, 7 Scott, 407, 2 Arn. 14, 3 Jur. 363, 8 L. J. C. P. N. S. 243; *Fosdick v. Stone*, L. R. 3 C. P. 607, 37 L. J. C. P. N. S. 301. See also cases in note to *Benton v. Collins* (N. C.) 47 L. R. A. 42.

And the injury caused by malicious prosecution and false imprisonment, like libel and slander, seems to have been formerly regarded, at least in England, as not susceptible of legal measurement, so that a verdict in an action therefor would be conclusive, however small it may be. *Apps v. Day*, 14 C. B. 112. For other cases see note to *Benton v. Collins* (N. C.) 47 L. R. A. 43.

So, actions for assault and battery seem to be governed by the same rule as those for malicious prosecution and false imprisonment, and the verdict was formerly deemed conclusive without reference to its smallness. *Benton v. Collins* (N. C.) 47 L. R. A. 33, and note thereto, p. 44.

As to what is sufficient to show bias or prejudice, or that the jury omitted to consider some of the elements of damage, see note to *Benton v. Collins* (N. C.) 47 L. R. A. 45.

That uncertainty as to the cause of the injury suffered, and as to the defendant's responsibility for it, and as to whether or not the plaintiff might not be equally to blame, appears to have been made a subject of consideration on the question of setting aside a verdict for inadequacy as going to sustain the verdict, see note to *Benton v. Collins* (N. C.) 47 L. R. A. 48.

As to the power of the court to increase the verdict given to such an amount as it deems just, instead of granting a new trial for inadequacy of damages, see cases in note to *Benton v. Collins* (N. C.) 47 L. R. A. 51.

But error, if any, in giving the plaintiff less than he is entitled to recover upon the finding of the issues, is one of which the plaintiff alone can complain; and if he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff.¹

¹*Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377; *Wolf v. Goodhue F. Ins. Co.* 43 Barb. 400; *Lambert v. Roberts*, 31 N. Y. S. R. 148, 9 N. Y. Supp. 607. See also note to *Benton v. Collins* (N. C.) 47 L. R. A. 49.

16. — computing interest.

A verdict is not bad, as being uncertain in amount, for not computing the interest properly awarded by the jury, if the amount thereof may be ascertained by mathematical calculation,¹ unless such computation is required by express statute.²

¹*New Orleans & C. R. Co. v. Schneider*, 13 U. S. App. 655, 60 Fed. Rep. 216, 8 C. C. A. 571; *Baltimore & O. R. Co. v. Dougherty*, 7 App. D. C. 378; *Lauman v. Clark*, 73 Ill. App. 659; *Page v. Cady*, 1 Cow. 115; *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. 219, and cases cited; *Darden v. Mathews*, 22 Tex. 320; *Buchanan v. Townsend*, 80 Tex. 534, 16 S. W. 315. See also *Brady v. Clark*, 12 Lea, 323, where objection to the form of such a verdict was made after the court had computed the interest, and the court held the objection too late, saying that if the objection had been made when the verdict was announced the jury would have been sent back to make the calculation. But see *Silsby v. Frost*, 3 Wash. Terr. 388, 17 Pac. 188, where it is held that a verdict for a certain sum with interest is not in proper form, but that it should be for a gross sum including the principal and interest due thereon duly computed. But it is not prejudicial error that this is not done, where it appears from the record that in the judgment from which defendant appealed no interest whatever was included. *Ibid.*

The form of the verdict is not material. The amount found by the jury is not uncertain because they choose to put their verdict in a form that requires a mathematical calculation to get the sum of their finding. The trial judge may require them to make the calculation, but it is not necessary that he do so. *New Orleans & C. R. Co. v. Schneider*, 13 U. S. App. 655, 60 Fed. Rep. 210, 8 C. C. A. 571.

The maxim *Id certum est quod certum reddi potest* is readily applicable to such verdicts. *Lauman v. Clark*, 73 Ill. App. 659.

Nor does failure to fix a rate of interest invalidate it, as interest in such case must be computed according to the rate provided by law. *Duncan v. Meserve*, 24 Or. 523, 34 Pac. 548.

But a verdict for a certain sum "with legal interest," without specifying any time from which interest is to be allowed, will not authorize a judgment for any interest whatever. Such a verdict cannot support a judgment except by treating the interest clause as surplusage. *Western Mill & Lumber Co. v. Blanchard*, 1 Wash. 230, 23 Pac. 839; *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837. See also *Murray v. King*, 30 N. C. (8 Ired. L.) 528. And in *Ranney v. Bader*, 48 Mo. 539, the interest clause in such a verdict was rejected as surplusage, and judgment entered for the principal sum found.

So held, also, of a verdict allowing interest from a time which could only be ascertained by reference to the evidence. *Fries v. Mack*, 33 Ohio St. 52.

²Thus in Georgia, where the Code (§§ 2882, 5342) provides that all judgments shall bear interest upon the principal amount recovered, and that no part of a judgment shall bear interest except the principal due on the original debt, the verdict must specify separately the amounts due for principal and for interest. *Hubbard v. McRae*, 95 Ga. 705, 22 S. E. 714. And a verdict which manifestly includes both principal and interest, without specifying the amount of each, will require a new trial unless plaintiff will renounce all further interest on the judgment. *Ibid.*

17. — improper allowance of interest.

Nor does the improper allowance of interest, either because no interest is allowable by law,¹ or because the interest allowed is excessive,² vitiate the verdict, if the interest improperly allowed is remitted.

¹*Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 15 S. E. 34. See also *Hepburn v. Dundas*, 13 Gratt. 219, where interest so improperly allowed was held to be mere surplusage, and was disregarded by the court in entering judgment.

²So held where the jury allowed interest for one month more than was proper. *Duzan v. Meserve*, 24 Or. 523, 34 Pac. 548. See also *Denike v. Denike*, 8 Misc. 604, 29 N. Y. Supp. 320 (where the appellate court reversed an order denying a new trial, and granted a new trial unless such excess was remitted); *McCormick v. Hickey*, 24 Mo. App. 302, where the action of the trial court in allowing a remittitur of the excess to be entered was approved.

And a verdict making the unsuccessful party liable to interest on interest is not ground for a new trial, if the successful party will vacate the judgment entered on the verdict, and enter judgment for the specific amount, expressly renouncing interest. *Buice v. McCrary*, 94 Ga. 418, 20 S. E. 632.

As to the allowance of interest on actual damages, and the propriety of a charge thereon, see *ante*, Division XXI., *The Instructions*, § 62.

18. Chance verdict.

A verdict which is not the result of the intelligent discussion and the honest and conscientious deliberation, and the expression of the ultimate conviction of each and all the jurors as to the rights of the parties under the law and the evidence, is unauthorized and should not be permitted to stand.¹

¹As where the jury left it to lot whether the verdict should be for one party or the other. *Mitchell v. Ehle*, 10 Wend. 595. See also cases in note to *Hauk v. Allen* (Ind.) 11 L. R. A. 706.

19. Compromise or quotient verdict.

And a verdict which is the result of marking, aggregation, and division in pursuance of a previous agreement by the jurors is invalid.¹

Otherwise, however, if there is no previous agreement by the jurors to abide the result so reached.²

¹Thus, where the jurors severally mark down the amount to which they think the prevailing party is entitled, the amounts so indicated are added together, and the total is divided by twelve, the quotient to be the verdict of the jury. *Dixon v. Pluns*, 98 Cal. 384, 20 L. R. A. 698, 31

Pac. 931, 33 Pac. 268; *Pawnee Ditch & Improv. Co. v. Adams*, 1 Colo. App. 250, 28 Pac. 662; *Flood v. McClure* (Idaho) 32 Pac. 254; *Chicago & I. Coal R. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; *Houk v. Allen*, 126 Ind. 568, 11 L. R. A. 706, 25 N. E. 897; *Roberts v. Farris*, 1 Cow. 238; *Harvey v. Rickett*, 15 Johns. 87; *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790. And in *Roy v. Goings*, 112 Ill. 656, where it appears on receiving the verdict that the jury had thus reached the sum awarded, it was held that the court properly sent the jury out again under a proper instruction to further consider their verdict. See also cases in note to *Hauk v. Allen* (Ind.) 11 L. R. A. 706.

So held, even though it is not clear that all jurors understood they were bound by the agreement. *Johnson v. Husband*, 22 Kan. 277. But *Wichita v. Stallings*, 59 Kan. 779, appx. 54 Pac. 689, holds otherwise where most of the jurors deny by affidavit that the verdict was so reached.

**Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co.* 57 Fed. Rep. 898; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *Dorr v. Fenno*, 12 Pick. 521; *Cortelyou v. McCarthy*, 37 Neb. 742, 56 N. W. 620; *Moses v. Central Park N. & E. River R. Co.* 3 Misc. 322, 23 N. Y. Supp. 23; *Tinkle v. Dunivant*, 16 Lea, 503.

As to what is proper evidence to show that the verdict is objectionable on this ground, see note to *Hauk v. Allen* (Ind.) 11 L. R. A. 706.

20. Number and unanimity of jurors.

The only verdict which can be received and regarded as the complete and valid verdict of the jury, upon which a judgment can be entered, is an open and public verdict by twelve men,¹ given in and assented to in open court as their unanimous act,² unless the parties expressly agree to a trial by a less number,³ or unless the number of jurors,⁴ concurring,⁵ necessary to a valid verdict, is otherwise expressly fixed by Constitution or statute.

¹At common law a jury consisted of twelve men. See cases cited in note to *State v. Bates* (Utah) 43 L. R. A. 33.

And, either expressly or impliedly, the Constitutions of most of the states have adopted the common-law jury of twelve men as the only lawful jury. See for cases so holding: *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 So. 300; *Larillian v. Lane*, 8 Ark. 372; *Allen v. Anderson*, 57 Ind. 389; *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296, 25 N. W. 251; *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Opinion of the Justices*, 41 N. H. 550; *People ex rel. Murray v. New York City & County Justices*, 74 N. Y. 406; *Lamb v. Lane*, 4 Ohio St. 176; *Deane v. Willamette Bridge Co.* 22 Or. 167, 15 L. R. A. 614, 29 Pac. 440; *Plimpton v. Somerset*, 33 Vt. 283; *Norval v. Rice*, 2 Wis. 22. See also cases cited in note to *State v. Bates* (Utah) 43 L. R. A. 33.

²*Lawrence v. Stearns*, 11 Pick. 501; *Scott v. Scott*, 110 Pa. 387, 2 Atl. 531;

Jacksonville, T. & K. W. R. Co. v. Adams, 33 Fla. 608, 24 L. R. A. 272, 15 So. 257; *Carroll v. Byers* (Ariz.) 36 Pac. 499; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418 (where it was said that if the term "jury," as used in the Michigan Constitution, authorizes anything else than an unanimous verdict, it means what it does not signify in any part of the Constitution or in any of the old statutes of the state). In *Adkins v. Blake*, 2 J. J. Marsh. 40, where the jury came into court and announced their verdict, two of the jurors declared that it was not their verdict and that they would not agree to it; but the court, on ascertaining that the jurors agreed in the room to submit to a majority, directed the verdict to be entered. This was held error, the court holding that where the verdict is reported the jurors must all sanction it, or it is not their finding. See also cases cited in notes to *State v. Bates* (Utah) 43 L. R. A. 33; *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 24 L. R. A. 272.

And by express constitutional provision in Texas, a verdict in the county court must be rendered as the unanimous verdict of the jury. *Jackson v. J. A. Coates & Sons* (Tex. Civ. App.) 43 S. W. 24.

But it has never been held that they must all render their conclusions in the same way and by the same method of reasoning. To require unanimity, not only in their conclusions, but also in the mode by which those conclusions are arrived at, would in most cases involve an impossibility, and would be practically destructive of the entire system of jury trials. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. So, it is not necessary that a jury should, in order to find a verdict, concur in a single view of the transaction disclosed by the evidence; and if the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation, and the rest upon another. *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658.

As to the right of a juror to dissent from the verdict, and the effect of such dissent, see *post*, Division XXV. § 8.

*In considering the question of the validity of the verdict of less than the common-law number of jurors, the point has often been raised as to whether or not the fact that a trial by the full jury of twelve has been waived, and a verdict by less than that number consented to, will validate the verdict; and it is generally held that where there has been such waiver and consent, and it so appears of record, the verdict will be upheld. See for example, *Scott v. Russell*, 39 Mo. 407; *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. 756; *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228. See also note to *State v. Bates* (Utah) 43 L. R. A. 33, 59.

And in several of the states there are express constitutional provisions permitting the waiver of a jury of twelve, and statutes making provision for consent to try with a less number of jurors than twelve. Thus, the Arkansas Constitution (art. 2, § 7, of the Declaration of Rights) provides that the right to trial by jury may be waived by the parties in all cases, in the manner prescribed by law; and statute (Mansf. Dig. §

2219) provision is made for the trial of causes other than felonies, by agreement of parties, by a jury of less than twelve.

So, in Texas, a statute (Tex. Rev. Stat. art. 3227) provides that the parties may by consent agree in a particular case to try with a less number than twelve. See note to *State v. Bates* (Utah) 43 L. R. A. 33, 59.

*Express provision is sometimes made by the Constitutions and statutes with reference to the mode of procedure to be adopted in case of a trial by less than the full number of jurors, where the number has been reduced by one or more of the jurors dying pending trial, or becoming disabled from sitting. Such a provision is contained in the Texas Constitution (art. 5, § 13), and by statute the verdict of the remaining jurors is rendered valid (Tex. Rev. Stat. art. 3229). But in such case the verdict of the remaining jurors must be signed by all of them (2 Sayles's Civ. Stat. art. 3101), unless the trial by the less number is with the consent of the parties. See *supra*, § 4, note 2. See also note to *State v. Bates* (Utah) 43 L. R. A. 33.

And a similar statute is in force in Iowa (Code, § 3713), except that, in such case, continuing the trial with the remaining jurors must be by consent entered by the court or shorthand reporter as a part of the record; otherwise the jury must be discharged. See *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296, 25 N. W. 251; *Kelsh v. Dyersville*, 68 Iowa, 137, 26 N. W. 38. See further on this question, note to *State v. Bates* (Utah) 43 L. R. A. 33.

The degree of the court has also been made a question for consideration in determining the constitutionality of a verdict by a less number of jurors than those constituting a jury at common law. If the court is one of record, it is generally held that it has jurisdiction only over causes triable by a common-law jury, and that, therefore, a verdict in those courts by a less number of jurors is unconstitutional. See for instance, *Norwell v. Deval*, 50 Mo. 272; *Baxter v. Putney*, 37 How. Pr. 140.

But in courts not of record it is competent for the legislature to provide for a jury of less than twelve men; and the Missouri Constitution expressly empowers the legislature to so provide. *State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551.

And the constitutionality of the verdict in civil cases by less than the common-law jury of twelve men has been upheld—especially in cases in inferior and justices' courts and courts not of record—under statutes of many of the states, notwithstanding that the Constitutions have provided that the right of jury trial shall remain inviolate. The constitutionality of those statutes has generally been upheld upon the ground that juries did not form any part of the machinery of such tribunals at common law, and upon the further ground that in such cases there is an appeal to the courts of common law, where the parties are entitled to a trial by jury unless the same is waived. This doctrine will be found admitted by the court in *Vaughn v. Scade*, 30 Mo. 600 (although that case turned upon the constitutionality of a verdict of a jury of six in a court of law commissioners,—a court of record in which a jury of less than twelve could not sit); *Ward v. Farwell*, 97 Ill. 593; *Rhodes Bur-*

ford Furniture Co. v. Mattox, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11; *Berry v. Chamberlain*, 53 N. J. L. 463, 23 Atl. 115. See also cases cited in note to *State v. Bates* (Utah) 43 L. R. A. 33.

Sometimes, however, the Constitution makes express provision for a jury of less than twelve in courts not of record. Such a clause is found in the Constitutions of Washington (art. 1, § 21) and North Dakota (art. 1, § 7). See also note to *State v. Bates* (Utah) 43 L. R. A. 33, for other similar constitutional provisions.

For an exhaustive treatment of the question of the number and agreement of jurors necessary to constitute a valid verdict, and the constitutionality of a verdict by less than twelve jurors, see notes to *State v. Bates* (Utah) 43 L. R. A. 33, and *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 24 L. R. A. 272.

*Some of the state Constitutions expressly provide that a verdict may be rendered, although not unanimous, provided the concurring jurors constitute a majority. Thus, the Declaration of Rights in the California Constitution (art. 1, § 7) provides that in civil actions three fourths of the jury may render a verdict. So also in Utah (art. 1, § 10). *Scott v. Provo City*, 14 Utah, 31, 45 Pac. 1005. See also note to *State v. Bates* (Utah) 43 L. R. A. 33, 80.

ABB.—34.

XXV.—RECEIVING VERDICT.

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| 1. Presence of parties. | 11. Power of the court to correct the verdict. |
| 2. Place. | 12. Special questions. |
| 3. Time—Sunday. | 13. Insisting on answers to special questions. |
| 4. Definiteness. | 14. — on definite answer. |
| 5. Sealed verdict. | 15. — failure to agree. |
| 6. Polling the jury. | 16. Insisting on general verdict when special questions are answered. |
| 7. —the question. | 17. — argument; exception. |
| 8. — the right and consequence of dissent. | |
| 9. Power of the jury to correct their verdict. | |
| 10. Power of the court to require jury to correct. | |

1. Presence of parties.

The judge ought not, without necessity, to receive a verdict unless the parties are present or represented, or have had fair notice and opportunity to be present if within reasonable call. But in the absence of an adjournment to a fixed hour it is their duty to be within call.¹

¹Counsel cannot rely on having a new trial because of the inadequacy or omission of notice to them that the jury have come in.

At common law a verdict could not be received by the court in the absence, or even without the consent of the plaintiff or his counsel, for his nonconsent was a voluntary nonsuit. *People v. Mayor's Court of Albany*, 1 Wend. 36. See also *ante*, Division XVIII. *Stopping the Case*. Under the new procedure a cause cannot be thus stopped at this point. Counsel for each party must hold himself in readiness to attend without notice, if there is no fixed adjournment or understanding that notice is to be given. *Christie v. Bowne*, 76 Hun, 42, 27 N. Y. Supp. 657; *Strowger v. Sample*, 44 Kan. 298, 24 Pac. 425; *Fitzgerald v. Clark*, 17 Mont. 100, 30 L. R. A. 803, 42 Pac. 273. A judgment will not be reversed because the verdict was received in the absence of counsel during a fixed adjournment, the court having announced that a verdict would be received during the recess if one was returned,—especially where no prejudice appears and counsel had made no arrangement to be given notice. *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan.

App. 730, 52 Pac. 577. And a verdict may be received in the absence of both parties and their counsel after proclamation of adjournment until the next day, under a statute providing that courts shall be always open, and that any business of the court may be transacted at any time. *Tim v. Rosenfeld*, 168 Mass. 393, 47 N. E. 106. And even where there was an understanding between counsel and court that the former, who was permitted to retire from the courtroom, was to be notified when the jury returned into court with their verdict, the neglect of the court so to notify counsel is not reversible error where no prejudice resulted. *Seaton v. Smith*, 45 Kan. 43, 25 Pac. 222.

The mere fact that a verdict was received in the absence of defendant and his counsel when neither had opportunity to be present, or—in jurisdictions where, after giving the case to the jury, there is no voluntary nonsuit—it was received in the absence of plaintiff and his counsel when neither had opportunity to be present, is not alone error, without some other informality, or some resulting prejudice to the party. *Perry v. Mulligan*, 58 Ga. 479 (defendant absent); *Stiles v. Ford*, 2 Colo. 128 (plaintiff absent; a well-considered case); *Merwin v. Wheeler*, 41 Conn. 14 (plaintiff absent). It is not necessarily a matter of right for the prisoner to have his counsel present on the reception of the verdict. *Sutcliffe v. State*, 18 Ohio, 469.

"It was their business to be in court when the judge was in court. . . . Counsel must see to it that they are near when the judge moves and be ready to move with him." *Perry v. Mulligan*, 58 Ga. 479.

2. Place.

The court may, when necessary on account of illness of a juror, adjourn to where he is to receive the verdict.¹ But the judge cannot, without the assent of the parties, receive the verdict at his private residence.²

¹In *King v. Faber*, 51 Pa. 387, where a juror was taken ill after the verdict was sealed, it was held no error for the court to adjourn to his house and there have the verdict rendered in the presence of the court officers and all parties in the same manner as if in court, the verdict being afterward publicly announced by the clerk in the courtroom.

²*Rosser v. McColly*, 9 Ind. 589 (held reversible error; decided under a statute providing that "when returned into court the foreman shall deliver the verdict and either party may poll the jury"). To the same effect is *Jackson v. State*, 102 Ala. 76, 15 So. 351, in which a verdict received by the judge at his hotel because of his illness was held invalid, in view of a Code provision requiring the court to be held in the county courthouse.

3. Time—Sunday.

Court may be opened on Sunday to receive a verdict in a cause submitted to the jury on a previous day,¹ and then may be adjourned over.²

¹*Cory v. Silcox*, 5 Ind. 370; *Baxter v. People*, 8 Ill. 385; *Stone v. Bird*, 16 Kan. 488; *Hoghtaling v. Osborn*, 15 Johns. 119; *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875; *Webber v. Merril*, 34 N. H. 202; *Hiller v. English*, 4 Strobb. L. 486; *Stone v. United States*, 29 U. S. App. 32, 64 Fed. Rep. 667, 12 C. C. A. 451; *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869 (holding *obiter* *Bass v. Irvin*, 49 Ga. 436). And see notes to *Henderson v. Reynolds* (Ga.) 7 L. R. A. 327, and *Stone v. United States*, 29 U. S. App. 32, 64 Fed. Rep. 667, 12 C. C. A. 451.

The statutory provision against opening court or transacting business therein on Sunday, except receiving a verdict or discharging a jury (2 N. Y. Rev. Stat. 275, § 7, same statute revised in Code Civ. Proc. § 6), impliedly allows the court on committing a cause to the jury on a Saturday to adjourn till Sunday. Such provision does not preclude the giving of further instructions on Sunday when a jury on that day report their disagreement. *Jones v. Johnson*, 61 Ind. 257. Or if it does the prohibition may be to that extent waived by neither party objecting. *Roberts v. Bower*, 5 Hun, 558.

²*Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627, and cases cited.

4. Definiteness.

If a verdict, special verdict, or finding is not definite or certain, either party may require it to be made so before the jury are discharged.¹

¹*Kansas P. R. Co. v. Pointer*, 14 Kan. 37; *Bruck v. Mausbury*, 102 Pa. 35. A party has a right to a definite and direct answer to an interrogatory where there is evidence upon which the answer can be founded. *Leavenworth, T. & S. W. R. Co. v. Jacobs*, 39 Kan. 204, 17 Pac. 791; *Chicago, B. & Q. R. Co. v. Greenfield*, 53 Ill. App. 424; *Cleveland, C. C. & I. R. Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140. But not where the interrogatory is fully covered by answers to other interrogatories. *Louisville, N. A. & C. R. Co. v. Kane*, 120 Ind. 140, 22 N. E. 80. The objection must be raised when the verdict is returned into court, otherwise it will be deemed to have been waived. *Detroit F. & M. Ins. Co. v. Chetlain*, 61 Ill. App. 450.

5. Sealed verdict.

The jury must all be present in open court,¹ at the opening of a sealed verdict.² But this may be expressly waived.³

¹Act of judge in receiving verdict in absence of parties and clerk, held to make it a privy verdict and of no effect, although read in court next morning. *Young v. Seymour*, 4 Neb. 86.

²*Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413 (juror taken insane after verdict sealed, and before opening); *District of Columbia v. Humphries*, 11 App. D. C. 68 (juror unable to appear because of illness); *King v. Wyatt*, 3 Ill. App. 388 (party deprived of right to poll); *King v. Faber*, 51 Pa. 387 (court adjourned to house of sick juror in order to secure presence; held no error); *Sargent v. State*, 11 Ohio, 472 (*dis-*

tum in criminal case); *Tifield v. Adams*, 3 Iowa, 487 (presence presumed if record does not show the contrary); *Bass v. Hanson*, 9 Iowa, 563 (accidental unsealing in the hands of foreman disregarded). Omission to ask jurors whether they agreed to the verdict held no error where objection was not made at the time. *Paige v. O'Neal*, 12 Cal. 483.

**Woods v. Van Buren County Comrs.* 1 Morris (Iowa) 441; presence of the jury was held expressly waived where the parties had stipulated that the jury might deliver it "to the officer in charge, and disperse," this being a waiver of the right to poll. *Koon v. Phoenix Mut. L. Ins. Co.* 104 U. S. 106, 26 L. ed. 670. So also of an agreement that they "need not return." *Pierce v. Hasbrouck*, 49 Ill. 23; *Burlingame v. Burlingame*, 18 Wis. 285. Otherwise of a mere agreement that they might render a sealed verdict. *Steele v. Etheridge*, 15 Minn. 503, Gil. 413; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Fox v. Smith*, 3 Cow. 23; *Rigg v. Bias*, 44 Kan. 148, 24 Pac. 56. An order to seal and deliver to the clerk, made under agreement of parties, held to dispense with return of the jury, and to preclude their amending the verdict afterward. *Trout v. West*, 29 Ind. 51.

6. Polling the jury.

Either party has an absolute right to have the jury polled on the rendering of their verdict, whether sealed or oral, at any time before it is recorded, unless the right has been expressly waived.¹

This rule does not apply to a verdict fixed by the direction of the court.²

¹*Labar v. Koplin*, 4 N. Y. 547; *Hubble v. Patterson*, 1 Mo. 392; *Martin v. Morelock*, 32 Ill. 485; *Crotty v. Wyatt*, 3 Ill. App. 388. To the same effect are *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724, and cases cited; *James v. State*, 55 Miss. 57, 30 Am. Rep. 496, and *District of Columbia v. Humphries*, 11 D. C. App. 68 (sealed verdict); *Egmann v. East St. Louis Connecting R. Co.* 65 Ill. App. 345 (special findings).

The right to poll the jury is not affected by an agreement that the jury may seal their verdict. *Steele v. Etheridge*, 15 Minn. 503, Gil. 413, *dictum*. But if the jury after agreeing upon their verdict disperse with the consent of the parties the court is not bound upon the subsequent return of the verdict to poll the jury. *Rutland v. Hathorn*, 36 Ga. 380. See also *supra*, § 5, note 3, for rule in case of agreement that they may seal and disperse. But permitting the jury to seal their verdict and separate without the consent of the parties does not take away the privilege of polling the jury under a statute providing that such a proceeding had with consent of parties is equivalent to a rendition and recording in open court, and that the jury shall not be polled or permitted to disagree thereto, unless by consent of parties in open court entered upon the record. *Walker v. Dailey*, 87 Iowa, 375, 54 N. W. 344.

In Massachusetts, Colorado, South Carolina, and Connecticut, however, it is not a matter of right to have the jury polled, the opportunity afforded for open dissent on the part of a juror being deemed sufficient. *Com*

v. Costley, 118 Mass. 1; *State v. Hoyt*, 47 Conn. 533, 36 Am. Rep. 89; *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. 436; *Martin v. Maverick*, 1 McCord L. 24. And in some other jurisdictions it is held that in civil cases a party has not a right to poll the jury, but that the matter rests entirely in the discretion of the court. *Blum v. Pate*, 20 Cal. 70; *Rutland v. Hathorn*, 36 Ga. 380; *Landis v. Dayton*, Wright (Ohio) 659. In Texas and Florida in the case of a sealed verdict brought in by consent, it is held that it is not a matter of right to have the jury polled, except in Texas, to ascertain whether they agreed when the verdict was sealed. *Hancock v. Winans*, 20 Tex. 320; *Whitner v. Hamlin*, 12 Fla. 18 (holding it discretionary). The polling of a jury which has returned a sealed verdict is waived by a failure to object to the rendering of such a verdict, under a court rule that an agreement on the part of counsel to receive a sealed verdict shall be treated as a waiver of the right to poll the jury, and that in all cases where the jury retired without objection to a sealed verdict such a verdict may be rendered. *Drda v. Schmidt*, 47 Ill. App. 267.

After the verdict has been received and recorded it is too late to make a request to poll the jury. *Blum v. Pate*, 20 Cal. 70; *High v. Johnson*, 28 Wis. 72 (no error to refuse such request). But the mere entry of the verdict in the clerk's rough minutes does not necessarily constitute a recording within the rule until after the jury are discharged. *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724 (where the jury, not yet discharged, were held properly polled after the entry of a sealed verdict in the clerk's minutes). Compare *Steele v. Etheridge*, 15 Minn. 503, Gil. 413, where it was held that a polling after recording was of no effect, even though it took place before the jury were discharged, and one of the jurors dissented. Held, also, that affidavits would not be received to prove that the polling really took place before the recording, when the record stated that the polling was after the verdict was recorded.

¹*Kinser v. Calumet Fire Clay Co.* 165 Ill. 505, 46 N. E. 372; *Donoghue v. Indiana & L. M. R. Co.* 87 Mich. 13, 49 N. W. 512; *Jameson v. Officer*, 15 Tex. Civ. App. 212, 39 S. W. 190; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319 (where, upon directing a verdict, it was held no error to refuse to allow the jury to be polled, although the statute provided that "either party may poll the jury").

7. — the question.

The question put to each juror, on polling, must simply be, "Is this your verdict?"¹

¹*Poulson v. Collier*, 18 Mo. App. 583. The reason is that the object in polling is simply to ascertain if the verdict announced is that of the jurors. *Labar v. Koplín*, 4 N. Y. 547 (error to allow the question, "Is this your verdict against each of defendants?"); *Leighton v. People*, 10 Abb. N. C. 261, Affirmed in 88 N. Y. 117, but not discussing the point (where, stating the proper question to be asked, it was held no error to decline to inform the jury that the answer given should be the conscientious individual opinion of each man); *Bowen v. Bowen*, 74 Ind. 470

(where the question, "Is this your verdict, and are you still satisfied with it?" was held properly excluded).

8. — the right and consequence of dissent.

A juror has a right to dissent from the verdict, whether sealed or oral, at any time before it is recorded and before they have been discharged.¹ Upon such dissent they should be sent back for further deliberation.²

¹*Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *Weeks v. Hart*, 24 Hun, 181; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724 (sealed verdict). But a juror who dissents from a sealed verdict he signed may be punished for contempt in signing what was not his verdict, if the act be not excused. *Van Vorst, J.*, in an unreported case. In Iowa, by express statutory provision, no dissent from a sealed verdict is permissible, unless reserved by agreement of parties where "by consent the jury have been permitted to seal their verdict and separate before it is rendered." *Miller v. Mabon*, 6 Iowa, 456. The refusal to permit a juror to change his vote is not error if on the evidence the court could have directed the verdict returned. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, *sub nom. W. B. Grimes Dry Goods Co. v. Malcolm*, 41 L. ed. 524, 17 Sup. Ct. Rep. 158.

A juror's answer that he consented to the verdict under protest, and his statement to the court when asked if it was his verdict, "It is, but I consented to it under protest," will not require the rejection of the verdict. *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855. And that, on polling the jury, some of them, after answering that the verdict was their verdict, added that they hesitated to agree to it, and had given their assent reluctantly and with doubt, will not vitiate the finding. *Congers v. Kirk*, 78 Ga. 480, 3 S. E. 442. And the fact that a juror who twice interrupted the judge in his address to the jury just before discharging them, and expressed a desire to speak, was not allowed to do so, is not ground for a new trial, where such juror had twice answered on a poll of the jury, that the verdict rendered was his verdict. *Hughes v. Detroit, G. H. & M. R. Co.* 78 Mich. 399, 44 N. W. 396. An evasive answer, such as "I consented to it" must be objected to at the time, if at all. *Green v. Bliss*, 12 How. Pr. 428. Dissent and change induced from being told that the legal effect of their special findings would be contrary to the general verdict, held not to avail. *Fitzpatrick v. Himelmann*, 48 Cal. 588.

²*Weeks v. Hart*, 24 Hun, 181; *Nickelson v. Smith*, 15 Or. 200, 14 Pac. 40; *Jessup v. Chicago & N. W. R. Co.* 82 Iowa, 243, 48 N. W. 77 (statute expressly requiring such a course). So held even where the jury have separated after sealing their verdict. *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290. And see *Johnson v. Oakes*, 80 Ga. 722, 6 S. E. 274, in which it was held that a jury whose verdict, through a misconception, represented the intention of but one juror out of the twelve, may be sent

back for further deliberation, even though they had dispersed after agreeing upon the verdict where they had not been discharged from the consideration of the cause and there was no suggestion that the jury had been tampered with. Contra in Pennsylvania, where a dissent from a sealed verdict upon a polling of the jury, who had separated after sealing the verdict, makes it necessary for the judge to treat it as a mistrial and discharge the jury. *Kramer v. Kister*, 187 Pa. 227; 44 L. R. A. 432, 40 Atl. 1008. See also *Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255, where sending back the jury for further deliberation upon dissent of a juror to a sealed verdict was upheld, on the grounds that the record failed to show that the jury had been permitted to separate or disband, and that no objection was made at the time.

9. Power of the jury to correct their verdict.

At any time before the verdict has been recorded and their relation to the case as jurors has ceased, the jury may alter their verdict either in form or substance, whether it be oral or sealed.¹

¹*Bishop v. Mugler*, 33 Kan. 145, 5 Pac. 756; *Herzberg v. Murray*, 8 Jones & S. 271; *Hamilton v. Barton*, 20 Iowa, 505; *Comer v. Jackson*, 50 Ala. 384; *Watertown Ecclesiastical Soc.'s Appeal*, 46 Conn. 230; *Footte v. Woodworth*, 66 Vt. 216, 28 Atl. 1034; *Farmers' Packing Co. v. Brown*, 87 Md. 1, 39 Atl. 625; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724 (sealed verdict); *Beal v. Cunningham*, 42 Me. 362 (insertion of "not" before "guilty" allowed); article in 20 Cent. L. J. 145, and cases cited.

The jury may, before separating and without communicating with anyone, be permitted to correct their verdict, on the ground of mistake, so as to carry out their original intention. *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172; *Almand v. Scott*, 83 Ga. 402, 11 S. E. 653. And they may be allowed to make the correction in open court without again retiring. *Twomey v. Linnehan*, 161 Mass. 91, 36 N. E. 590. But the correction must be made at the time of announcing the mistake. Thus, where the jury announced when their verdict was returned, that it did not express their real intention, they should have been required then to correct it and should not have been allowed to separate without the consent of the parties, nor permitted on the next day to return and complete their verdict against objection. *Nickelson v. Smith*, 15 Or. 200, 14 Pac. 40.

A sealed verdict may be corrected by a jury who have separated and afterwards come into court, at any time before it is recorded. *Loudy v. Clarke*, 45 Minn. 477, 48 N. W. 25; *Thomas v. Upper Merion Twp.* 10 Pa. Co. Ct. 414. Filing a sealed verdict not recording, within this rule. *Rees v. Stille*, 38 Pa. 138. Contra, *Miller v. Mabon*, 6 Iowa, 456, under a statute providing that sealing is "equivalent to a rendition and recording thereof in open court," where sealing and separation is with consent of parties.

10. Power of the court to require jury to correct.

Before a verdict, whether oral or sealed, is recorded, and the jury have been dismissed from their relation as such to the case, the court

has power to require them to reconsider their verdict, not merely to correct a mistake in form or make that plain which was obscure, but to supply what is wanting, or alter it in substance, if they so agree.¹

This rule applies, whether they have announced agreement,² or dissent appears.³

¹*Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Bolster v. Cummings*, 6 Me. 85. To the same effect are *Reitenbaugh v. Ludwick*, 31 Pa. 131 (sealed verdict); *Crane Lumber Co. v. Otter Creek Lumber Co.* 79 Mich. 307, 44 N. W. 788 and *Sutliff v. Gilbert*, 8 Ohio, 405 (computation which verdict directed to be made); *Mason v. Massa*, 122 Mass. 477 (arithmetical addition); *Brown v. Dean*, 123 Mass. 254 (verdict, nominal damages and that defendant lower his mill dam. Correction, substantial damages allowed); *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796; *Fort Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242, and *Maclin v. Bloom*, 54 Miss. 365 (omission to state amount supplied); *Rush v. Pedigo*, 63 Ind. 479 (omission to answer special questions supplied); *Wightman v. Chicago & N. W. R. Co.* 73 Wis. 169, 2 L. R. A. 185, 40 N. W. 689 (determination of questions submitted required to be in accordance with a correct understanding of the instructions); *Smith v. Lynch*, 7 Colo. App. 383, 43 Pac. 670; *Hatch v. Attrill*, 118 N. Y. 383, 23 N. E. 549; *Rogan v. Mullins*, 22 App. Div. 117, 47 N. Y. Supp. 920, and *Newell v. Wilgus* (Pa.) 11 Atl. 365 (verdict for less sum than party is entitled to, if entitled to verdict at all). But see *Morris v. Burke*, 15 Mont. 214, 38 Pac. 1065 (holding that the court is not justified in refusing to accept a verdict because for a less amount than that which the successful party is entitled to receive, if entitled to any verdict, under a statute providing that if a verdict be informal or insufficient in not covering the whole issue submitted, or in any particular, it may be corrected by the jury under the advice of the court); *Jackson County Comrs. v. Nichols*, 139 Ind. 611, 38 N. E. 526 (holding that failure of evidence to support answers to interrogatories is not a ground for returning them to the jury for further answers). And see note to *Gaither v. Wilmer* (Md.) 5 L. R. A. 756, and article in 20 Cent. L. J. 145, and cases cited. If the verdict is inadequate in form the court has power to interrogate the jury upon it and send them out for further deliberation necessary to put it in proper form. *Dorr v. Fenno*, 12 Pick. 521.

The court may require a jury which have separated after sealing a verdict to put the verdict in proper form. *Rogers v. Sample*, 25 Neb. 141, 44 N. W. 86; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Moore v. Merchants' Loan & T. Co.* 70 Ill. App. 210; *Childs v. Carpenter*, 87 Me. 114, 32 Atl. 780. As, to supply their omission to answer certain special questions, there being no claim of dishonesty or suggestion of improper influence. *Olwell v. Milwaukee Street R. Co.* 92 Wis. 330, 66 N. W. 362; *Spencer v. Williams*, 160 Mass. 17, 35 N. E. 88. But it would be improper to send the jury out to alter the substance of their verdict, or to settle any new principle. *Sutliff v. Gilbert*, 8 Ohio, 405.

²*Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co.* 110 Mass. 70, 14 Am. Rep. 579.

¹*Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724.

11. Power of the court to correct the verdict.

The court has power to correct an informality in the verdict, or to correct the entry thereof so as to make it conform to the real finding of the jury:¹ If a verdict disregards instructions properly given, the court may (if the case affords the means of so doing without a further finding upon a question which ought to be determined only by the jury) correct the verdict in substance to conform to such instructions;² otherwise the court cannot alter a verdict in substance.³

¹*Lincoln v. Cambria Iron Co.* 103 U. S. 412, 26 L. ed. 518; *Woodruff v. Webb*, 32 Ark. 612; *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130; *Clapp v. Martin*, 33 Ill. App. 438; *Chittenden v. Evans*, 48 Ill. 52; *Humphreys v. Woodstown*, 48 N. J. L. 588, 7 Atl. 301. To the same effect are *D. M. Osborne & Co. v. Morris*, 21 Or. 367, 28 Pac. 70 and *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544 (verdict against both when intended only against one; the latter case overruling in effect dictum in *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724); *Murphy v. Stewart*, 2 How. 263, 11 L. ed. 261 (correcting general verdict so as to apply to single count); *Trevor v. Hawley*, 99 Mich. 504, 58 N. W. 466 (correcting general verdict so as to make it correspond with the special findings); *O'Brien v. Palmer*, 49 Ill. 72 (rejecting surplusage); *High v. Johnson*, 28 Wis. 72 (inserting nominal damages where no damages were found); *Chamberlain v. Brady*, 17 Jones & S. 484 (correcting errors in adding); *West v. Bank of Americus*, 63 Ga. 230 (referring to pleadings to determine a great ambiguity in respect to amount, viz., meaning of "eighteen 1800 dollars"). And see note to *Gaither v. Wilmer* (Md.) 5 L. R. A. 756.

The court may correct a formal omission in a verdict, where it is defective in failing to find a material, but not controverted, issue, if done before the discharge and with the joint action of the jury. *Fathmam v. Tumilty*, 34 Mo. App. 236. And where the written verdict of the jury in ejectment was for the amount of land claimed, it was proper for the court to direct counsel to formulate the verdict by setting out the land by metes and bounds, where it was done in the presence of the jury and sanctioned by them as in accordance with their finding. *Goebel v. Pugh*, 88 Ky. 34, 10 S. W. 1.

²*Schweitzer v. Connor*, 57 Wis. 177, 14 N. W. 922; *Hilburn v. Harrell* (Tex. Civ. App.) 29 S. W. 925 (correction made at jury's request and in their presence); *Lowenstein v. Lombard*, 2 App. Div. 610, 38 N. Y. Supp. 33.

³*Donahue v. Wippert*, 7 Misc. 506, 28 N. Y. Supp. 495; *Dycr v. Combs*, 65 Mo. App. 148; *Fiore v. Ladd*, 29 Or. 528, 46 Pac. 144; *Clouser v. Patterson*, 122 Pa. 372, 15 Atl. 444; *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295. Under a statute giving the jury the power in suits for divorce to determine the rights and liabilities of the parties, the court has no authority to revise a verdict which gives to both parties the right to marry again, by

denying such right to either party. *Montfort v. Montfort*, 88 Ga. 641, 15 S. E. 688.

12. Special questions.

Where the jury finds a general verdict, the court may instruct it to find also specially upon one or more questions of fact stated in writing.¹

¹N. Y. Code Civ. Proc. § 1187, third clause. It is within the discretion of the trial judge, to the exercise of which no exception lies, to put inquiries to the jury as to the grounds upon which they found their verdict; their answers may be made part of the record and will have the effect of special findings of the facts stated by them. *Spurr v. Shelburne*, 131 Mass. 429. So, where the jury have returned a general verdict for plaintiff in an action for the negligent killing of his intestate, the court may ask them if they found the negligence was in reference to a particular claim made by plaintiff and submitted to them, and upon their answering in the affirmative, direct the entry of a special verdict to that effect. *Germond v. Central Vermont R. Co.* 65 Vt. 126, 26 Atl. 401.

13. Insisting on answers to special questions.

Where the statute makes the putting of special questions a matter of right it is error for the court, against the objection of a party at whose request proper special questions have been put, to receive a general verdict without requiring answers to such questions.¹

¹*Maxwell v. Boyne*, 36 Ind. 120; *Rathbun v. Parker*, 113 Mich. 594, 72 N. W. 31. It is error to instruct the jury that they need not answer such questions if in doubt; because, upon every material question one party or the other holds the affirmative, and if he fails to make out his case upon it by the evidence the finding should be against him upon it. *Crane v. Reeder*, 25 Mich. 303. And that the jury on returning a general verdict declare their inability to agree upon an answer to a material special question does not justify the court in directing them to answer the question by saying that they do not agree; they should be required to give a proper answer. *Clark v. Weir*, 37 Kan. 98, 14 Pac. 533. But a jury need not answer special questions submitted to them, where no evidence is introduced upon which answers could be given. *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027.

Whether it is error to do so where the putting of such questions is discretionary is disputed. *Affirmative*—*Doom v. Walker*, 15 Neb. 339, 18 N. W. 138. Where such questions are material. *Sandwich Enterprise Co. v. West*, 42 Neb. 722, 60 N. W. 1012. *Negative*—*Moss v. Priest*, 19 Abb. Pr. 314.

But it is not error to refuse to require answers to special questions, where answers in favor of the party asking them would not affect the general result. *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258; *Ohio & M. R. Co. v. Ramey*, 39 Ill. App. 409, Affirmed in 139 Ill. 9, 28 N. E. 1087; *John-*

son v. Continental Ins. Co. 39 Mich. 33; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Schneider v. Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783.

14. — on definite answer.

A statement of the opinion or impression of the jury is not enough as an answer to a special question. The finding should be positive.¹

¹*Hopkins v. Stanley*, 43 Ind. 553, 559, and cases cited.

15. — failure to agree.

If the questions have not been withdrawn and the jury cannot agree on one which involves a fact essential to sustain their general verdict, the general verdict cannot avail.¹

But the verdict is not vitiated by inability to agree on which of the two alternatives they rely on, if each would alone support the verdict.²

¹*Ebersole v. Northern C. R. Co.* 23 Hun, 114; *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, *dictum*.

²*Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658; *dictum* in *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280. See further, *post*, Division XXVI. §§ 4-7.

16. Insisting on general verdict when special questions are answered.

Where special questions are answered the party has a right to have a general verdict rendered, unless a proper special verdict is made.¹

¹*Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; *Casey v. Dwyre*, 15 Hun, 153; *Eudaly v. Eudaly*, 37 Ind. 440; *Taft v. Baker*, 2 Kan. App. 600, 42 Pac. 502.

Interrogatories with their answers constitute a special verdict within this rule only where they embrace and cover all the issues in the cause. *Pea v. Pea*, 35 Ind. 387; *Coleman v. St. Paul, M. & M. R. Co.* 38 Minn. 260, 36 N. W. 638. But a party waives his right to a general verdict by stipulating that certain questions of fact be submitted to the jury and that the other questions be reserved and decided by the court and by failing to object when the answers of the jury are returned. *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197.

It is reversible error for the court to interfere with the statutory discretion of the jury to "render a general or special verdict" and prevent them from returning a general verdict (*Shadbolt & B. Iron Co. v. Camp*, 80 Iowa, 539, 45 N. W. 1062) where the special findings do not fully cover the cause. *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. 588. But the reception by the court of special findings alone by a jury who have been directed to return both a general and special verdict is not available error,—especially when no exception is taken when the findings are returned. *National Horse Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. 616.

17. — argument; exception.

It is in the discretion of the judge whether to hear, in presence of the jury, argument of counsel on the question of correcting a verdict.¹

An exception lies to error in directing a correction.²

¹*Ruffing v. Tilton*, 12 Ind. 259. But where it is manifest that the jury did not answer the special questions for fear that they would interfere with their general verdict, it is error to permit counsel to suggest that the verdict practically covers them where the jury, upon again retiring, answer the questions in such a way as not to conflict with the general verdict. *Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 101 Mich. 5, 59 N. W. 426. And it is error to permit counsel in the presence of the jury to discuss the probability of their having misunderstood a special question to which they returned an answer inconsistent with their general verdict, and to recall them after being discharged, and to send them back to reconsider the question after a juror has dissented upon a poll of the jury. *Zimmerman v. Detroit Sulphite Fibre Co.* 113 Mich. 1, 71 N. W. 321.

²*Chittenden v. Evans*, 48 Ill. 52.

XXVI.—APPLICATIONS AFTER VERDICT.

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| 1. Discharge terminates power; correction. | 9. Motion for nonsuit. |
| 2. Omission to record. | 10. Motion to set aside verdict taken subject, etc. |
| 3. Judgment for more than demanded in complaint. | 11. Further questions. |
| 4. Effect of special findings. | 12. Dismissing for want of jurisdiction. |
| 5. — inconsistency between special findings. | 13. Certificate for costs. |
| 6. — indirect finding. | 14. Certificates of probable or reasonable cause. |
| 7. — failure or refusal to find. | 15. — application for. |
| 8. Ordering exceptions to the appellate division. | 16. Additional allowance. |

1. Discharge terminates power; correction.

After the jury have been discharged and have separated, they cannot be recalled to act as a jury in respect to the verdict.¹

But the court have power, within a reasonable time, to amend a mistake in the verdict; and the judge's notes,² or the jurors' testimony may be used to show what the verdict really was for the purpose of correcting the minutes.³

¹*St. Clair v. Caldwell*, 72 Ala. 527; *Rigg v. Cook*, 9 Ill. 336; *Trout v. West*, 29 Ind. 51; *Settle v. Alison*, 8 Ga. 201; *Richards v. Page*, 81 Me. 563, 18 Atl. 289; *Mitchell v. Mitchell*, 122 N. C. 332, 29 S. E. 367; *Walters v. Jenkins*, 16 Serg. & R. 414, 16 Am. Dec. 585; *Denison & P. S. R. Co. v. Giersa* (Tex. Civ. App.) 50 S. W. 1039; *Sargent v. State*, 11 Ohio, 472 (criminal case); *People v. Reagle*, 60 Barb. 527, 546 (so held in a criminal case even where discharge was illegal. *Contra, Dearborn v. Newhall*, 63 N. H. 301.

Otherwise where the court directed them to be discharged, and before the direction was recorded or they had separated, they found they could agree. *Koontz v. Hammond*, 62 Pa. 177. And they may be recalled after discharge to correct their verdict as to a mere matter of form which might have been corrected by the court. *Schoolfield v. Brunton*,

20 Colo. 139, 36 Pac. 1103; *Howar& v. Kopperl*, 74 Tex. 494, 5 S. W. 627. Or to amend their unrecorded verdict by reducing it to the amount claimed by the party in whose favor it was rendered. *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21. So the recalling of a jury a few minutes after they have rendered their verdict and been discharged, for the purpose of correcting an unintentional mistake with reference to a description of property, is not reversible error where the correction was made before any improper influence could have been exerted upon the jury. *Sigal v. Miller* (Tex. Civ. App.) 25 S. W. 1012.

¹*Murphy v. Stewart*, 2 How. 263, 281, 11 L. ed. 261, 268; *Clark v. Lamb*, 8 Pick. 415, 19 Am. Dec. 332. But even if the judge's notes can be used for such purpose, a substantial amendment to a recorded verdict cannot be made after the jury have separated, upon counsel's affidavit or the judge's own recollection of what occurred at the trial. *Gaither v. Wilmer*, 71 Md. 361, 5 L. R. A. 756, 18 Atl. 590.

²This is the settled rule in New York. *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559; *Dayton v. Church*, 7 Abb. N. C. 367; *Burlingame v. Central R. Co.*, 23 Blatchf. 142, 23 Fed. Rep. 706 (where a jury was recalled two days after their verdict was rendered and it was corrected on their affidavits that interest was intended to be added). But the contrary rule prevails in a number of jurisdictions. *Parker v. Lake Shore & M. S. R. Co.* 93 Mich. 607, 53 N. W. 834; *Little v. Larrabee*, 2 Me. 37, 11 Am. Dec. 43; *Gaither v. Wilmer*, 71 Md. 361, 5 L. R. A. 756, 18 Atl. 590, *dictum*; *Walters v. Jenkins*, 16 Serg. & R. 414, 16 Am. Dec. 585; *Reitenbaugh v. Ludwick*, 31 Pa. 131, *dictum*; *Wertz v. Cincinnati, H. & D. R. Co.* 30 Ohio L. J. 280; *Sargent v. State*, 11 Ohio, 472, *dictum*. So by statute in Georgia. *Shelton v. O'Brien*, 76 Ga. 820.

2. Omission to record.

An omission to properly record the verdict is an irregularity only.¹

¹*Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304; *State v. Levy*, 24 Minn. 362 (where entry of verdict after discharge of jury was held not to impair the verdict where before their discharge it was read to them and they were asked if it was their verdict and they assented to it, even though a statute substantially required the clerk to immediately record the verdict and then read it to the jury before their discharge).

As to what properly constitutes a recording, see *Warner v. New York C. R. Co.* 52 N. Y. 437, 443, 11 Am. Rep. 724 (per Folger, J.).

3. Judgment for more than demanded in complaint.

Where the amount of a verdict exceeds the sum demanded in the complaint, the court has no power to amend the complaint by increasing the demand to correspond with the amount of the verdict, unless plaintiff consents to a new trial and pays defendant's costs.¹ But the plaintiff may take judgment for the amount demanded in his complaint, remitting the excess.²

The objection that the amount of recovery exceeds demand is waived unless taken before the entry of judgment.³

And an allegation of damages, as distinguished from a demand in the demand for relief, may, it seems, be amended after a verdict exceeding the amount of the allegation, but not exceeding the demand.⁴

¹*Corning v. Corning*, 6 N. Y. 97; *Decker v. Parsons*, 11 Hun, 295; *Pharis v. Gere*, 31 Hun, 443; *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. 721. Compare *Knapp v. Roche*, 62 N. Y. 614 (sanctioning amending at trial to conform complaint to proof).

²*Corning v. Corning*, 6 N. Y. 97; *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. 721; *Callanan v. Shaw*, 24 Iowa, 441; *Crabb v. Nashville Bank*, 6 Yerg. 332; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104. Compare *Lewis v. Cooke*, 1 Harr. & M'H. 159, where, on the return of a writ of inquiry for damages, a release was entered for that portion of the damages assessed by the inquisition in excess of those laid in the declaration, and judgment entered for the balance. And this right may be exercised at a subsequent term (*Hemmenway v. Hickes*, 4 Pick. 497) and even after error brought. *Furry v. Stone*, 1 Yeates, 186; *Crabb v. Nashville Bank*, 6 Yerg. 332.

But a remittitur should not be allowed unless the amount of the excess in the verdict clearly appears; otherwise the verdict should be set aside. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

³*Brown v. Schoonmaker* (N. Y.) 10 Rep. 745.

⁴*Schultz v. Third Ave. R. Co.* 89 N. Y. 242, 247 (per Earl, J.). Where a complaint has been improperly amended after verdict by increasing the demand it seems that the irregularity in the verdict should be taken advantage of by motion, and not by an exception. *Diossy v. Morgan*, 74 N. Y. 11, 14.

4. Effect of special findings.

Answers to special questions submitted to the jury, if inconsistent with the general verdict, control the latter and the court may give judgment accordingly,¹ and this is to be entered without setting aside the general verdict.²

A finding is not inconsistent with the general verdict within this rule, if any other hypothesis of fact capable of being supported by the evidence before the jury might supply its place.³

¹*McDermott v. Higby*, 23 Cal. 489; *Rio Grande Southern R. Co. v. Deasey*, 3 Colo. App. 196, 32 Pac. 725; *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31 (citing Dak. Code Civ. Proc. § 261, but holding that the special findings were not inconsistent with the general verdict); *Gwin v. Gwin* (Idaho) 48 Pac. 295 (citing Idaho Rev. Stat. § 4397); *Nelson v. Neely*, 63 Ind. 194; *Korrady v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069; *Nickols v. Weaver*, 7 Kan. 373 (citing Kan. Gen. Stat. 684, § 287); *Tobie v. Brown County Comrs.* 20 Kan. 14;

School Dist. No. 46 v. Lund, 51 Kan. 731, 33 Pac. 595; *Baird v. Chicago, R. I. & P. R. Co.* 55 Iowa, 121, 7 N. W. 460; *Maceman v. Equitable Life Assur. Soc.* 69 Minn. 285, 72 N. W. 111; *Rand v. Grubbs*, 26 Mo. App. 591; *Neimick v. American Ins. Co.* 16 Mont. 318, 40 Pac. 597; *Ogg v. Shehan*, 17 Neb. 323, 22 N. W. 556; *Richardson v. Weare*, 62 N. H. 80; *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. 251, 263 (per Brady, J.); *Dempsey v. New York*, 10 Daly, 417 (citing N. Y. Code Civ. Proc. § 1188); *Blevins v. Atchison, T. & S. F. R. Co.* 3 Okla. 512, 41 Pac. 92; *Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 601; *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632. And see note to *Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 6 L. R. A. 574. To the same effect are *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 492, 14 S. E. 234; *Culbertson Irrig. & Water Power Co. v. Olander*, 51 Neb. 539, 71 N. W. 298; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 46 Pac. 407, 45 Pac. 743, and *Lease v. Clark*, 20 Cal. 387 (judgment reversed for error in refusing to enter judgment on special findings); *Bremmerman v. Jennings*, 61 Ind. 334 (where upon a general verdict for a defendant, who had set up fraud and failure of consideration in an action on a promissory note, held error to refuse to enter judgment for plaintiff upon the special findings that he bought the note for value before maturity and without notice).

All reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings of fact. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530. Thus, all questions in the case not covered by the special findings are to be considered as having been found in favor of and covered by the general verdict. *Johnson v. Miller*, 82 Iowa, 693, 47 N. W. 903, 48 N. W. 1081; *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 334, 31 N. E. 792.

The general verdict will stand unless the inconsistency between it and the special findings is manifest (*Case v. Chicago, M. & St. P. R. Co.* 100 Iowa, 487, 69 N. W. 538; *Bevins v. Smith*, 42 Kan. 250, 21 Pac. 1064), and the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31. And the inconsistency must be irreconcilable. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Stringer v. Frost*, 116 Ind. 447, 2 L. R. A. 614, 19 N. E. 331; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216; *Gates v. Chicago, M. & St. P. R. Co.* 2 S. D. 422, 50 N. W. 907. And where the special findings and general verdict can be harmonized by taking into consideration the entire record of the case and construing the same liberally for that purpose, it is the duty of the court so to harmonize them. *Bevins v. Smith*, 42 Kan. 250, 21 Pac. 1064. The inconsistency is material only where the fact found is an ultimate fact, or one from which the existence or nonexistence of such ultimate fact necessarily follows. *Ebsery v. Chicago City R. Co.* 164 Ill. 518, 45 N. E. 1017. But a finding of probative facts from which the court is enabled to say that an ultimate fact necessarily results is sufficient ground upon which to set aside a general verdict ren-

dered by the jury in opposition to such fact. *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162, and cases cited.

Dempsey v. New York, 10 Daly, 417. See, however, *Neimick v. American Ins. Co.* 16 Mont. 318, 40 Pac. 597 and *Blevins v. Atchison, T. & S. F. R. Co.* 3 Okla. 512, 41 Pac. 92 (judgment setting aside general verdict and rendering judgment on special findings affirmed). And see *Omaha & R. Valley R. Co. v. Hall*, 33 Neb. 229, 50 N. W. 10, in which it was held error to refuse to set aside a general verdict inconsistent and in conflict with a special finding of fact.

McMurray v. Boyd, 58 Ark. 504, 25 S. W. 505; *Cleveland, C. C. & St. L. R. Co. v. Johnson*, 7 Ind. App. 441, 33 N. E. 1004; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 23 N. W. 740, 27 N. W. 466.

The true test as to whether special findings by the jury are inconsistent and contradictory either in themselves or with the general verdict, is whether they would warrant a different judgment from the one entered. *Gwin v. Gwin* (Idaho) 48 Pac. 295.

5. — inconsistency between special findings.

The general verdict controls as between special findings inconsistent with themselves.¹

¹*Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257; *Smith v. Heller*, 119 Ind. 212, 21 N. E. 657; *Parke County Comrs. v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Williams v. Eikenberry*, 22 Neb. 210, 34 N. W. 373. Contra, in Kansas, where inconsistency of answers to special interrogatories with each other, as well as with the general verdict, precludes the entry of any judgment and requires a new trial. *Kansas City v. Brady*, 53 Kan. 312, 36 Pac. 726; *Shoemaker v. St. Louis & S. F. R. Co.* 30 Kan. 359, 2 Pac. 517; *St. Louis & S. F. R. Co. v. Shoemaker*, 38 Kan. 723, 17 Pac. 584.

6. — indirect finding.

A special finding to the effect that there is not sufficient evidence of the existence of the fact concerning which the question was asked is equivalent to a finding against it,¹ and will control a general verdict which requires proof of the existence of such fact to support it.²

¹*McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689.

The answer "We do not know" amounts simply to a finding that adequate proof of the existence of the fact concerning which the question was proposed has not been produced and is equivalent to a finding against the party holding the affirmative upon such fact. *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Morrow v. Saline County Comrs.* 21 Kan. 484; *Union P. R. Co. v. Shannon*, 38 Kan. 476, 16 Pac. 836. See, however, *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. 729, holding that such an answer fails to establish the fact inquired about either one way or the other, and *Hawley v. Atlantic*, 92 Iowa, 172, 60 N. W. 519, in which the answer "Can't say" was held equivalent to no answer at all.

³*Atchison, T. & S. F. R. Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953; *Hayman v. Simmons*, 4 Kan. App. 1, 45 Pac. 728; *Mechanics' Bank v. Barnes*, 86 Mich. 632, 49 N. W. 475. But such a finding is immaterial unless the case as made by the pleadings and evidence is so circumstanced that no recovery can be had so long as the question is unsettled. *Chicago & E. I. R. Co. v. Goyette*, 133 Ill. 21, 24 N. E. 549.

7. —failure or refusal to find.

If the jury fail to agree on an answer to a special question, this is equivalent to a finding inconsistent with the general verdict, provided the fact is indispensable to support such a verdict.¹ Otherwise, if the verdict can be supported on any other hypothesis within the scope of the evidence before the jury.²

¹It is error to enter judgment upon a general verdict where the jury report their inability to agree upon an answer to a question propounded to them for a special finding which embraces the controlling issue in the cause. *Tourtlotte v. Brown*, 1 Colo. App. 408, 29 Pac. 130. Failure to agree upon answers to material questions will be construed as equivalent to findings against the party having the burden of proof, notwithstanding a general verdict in his favor. *Nichols v. Wadsworth*, 40 Minn. 547, 42 N. W. 541.

²*Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 23 N. W. 745, 27 N. W. 466; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 669, 42 N. W. 513; *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258.

8. Ordering exceptions to the appellate division.

In New York a party who has taken an exception may move before the trial judge at any time during the same term, that the exceptions be heard in the first instance by the appellate division of the supreme court (formerly the general term), and that judgment be suspended in the meantime. It is in the discretion of the judge to grant or deny the motion.¹

¹New York Code Civ. Proc. § 1000. If granted, the proceeding at the appellate division is treated as a motion for a new trial, and may be brought on by either party. *Ibid.*

This may be done in case of a nonsuit. Code Civ. Proc. § 1000, as amended in 1882, superseding *Seely v. New York C. & H. R. R. Co.* 25 Hun, 280. So, under the corresponding section of the Code of Procedure (§ 265), exceptions could be had at general term in case of a nonsuit. *Lake v. Artisans' Bank*, 3 Abb. App. Dec. 10, 3 Abb. Pr. N. S. 209, 3 Keyes, 276, Reversing 17 Abb. Pr. 232; *Moloney v. Dows*, 9 Abb. Pr. 86, 18 How. Pr. 27; *Brown v. Conger*, 8 Hun, 625. And plaintiff's exception to a nonsuit could be ordered to be heard at general term. *Mason v. Breslin*, 9 Abb. Pr. N. S. 427, 40 How. Pr. 436, 2 Sweeny, 386. In *Johnson v. New York, O. & W. R. Co.* 30 Hun, 166, a case arising under Code Civ. Proc.

§ 1000, it seems to be assumed that exceptions could be heard at general term in case of a nonsuit, but the point was not raised or discussed because the court held that the general term of the supreme court had no jurisdiction of exceptions taken in a county court.

This motion, however, cannot be availed of in a county court, because it has no general term, and the general term of the supreme court has no jurisdiction in such a motion made in the county court. *Johnson v. New York, O. & W. R. Co.* 30 Hun, 166.

This motion may be granted even though a motion on the minutes for a new trial is denied. *Garner v. Mangam*, 14 Jones & S. 365. But not where the motion on the minutes for a new trial was founded on exceptions, since it is obvious that exceptions cannot be heard in the first instance at the general term if they have already been heard and determined by the trial judge. *Schram v. Werner*, 81 Hun, 561; *Byrnes v. Delaware & H. C. Co.* 7 N. Y. Week. Dig. 549.

A special term cannot entertain and dispose of the motion for a new trial while an order continues in force sending the exceptions in the first instance to the general term. *Price v. Keyes*, 1 Hun, 177, Reversed on other grounds in 62 N. Y. 378.

An oral direction by the court appearing in the record, that exceptions be heard in the first instance by the general term is not a sufficient compliance with the statute and cannot be effectuated by a direction in writing after the close of the term. *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* 6 App. Div. 567, 40 N. Y. Supp. 219. But the minutes of trial signed by the clerk containing a statement that exceptions are to be heard in the appellate division in the first instance, entry of judgment to be suspended in the meantime, are a sufficient certification of the entry of the necessary order for the hearing of the exceptions in this way. *Sedgwick v. Macy*, 24 App. Div. 1, 49 N. Y. Supp. 154.

The order sending exceptions to the general term does not of itself, it seems, suspend the entry of judgment, and should therefore expressly provide for the suspension of judgment upon the verdict. *Douglas v. Habersstro*, 10 Abb. N. C. 6, 62 How. Pr. 29.

An application to vacate and suspend judgment pending the determination of exceptions directed to be heard in the first instance by the general term is a motion within the meaning of the Code provision that a motion upon notice in an action in the supreme court must be made within the judicial district in which the action is triable, or in the county adjoining that in which it is triable, except that where it is triable in the first district the motion must be made in that district. *Thompson v. Thompson*, 52 Hun, 117, 4 N. Y. Supp. 842. But the provision that the order may be revoked or modified in court or out of court by the judge who made it, should be construed as a limitation upon the power of a judge out of court, and not as a limitation upon the power of the court; and such order may be modified at any special term held by any judge. *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522.

Only the exceptions are sent to the general term (appellate division). The only function of the latter court is to grant or deny a motion for a

new trial made upon the exceptions and to order judgment accordingly; it cannot go further and dismiss the complaint upon the merits. *Mattheus v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L. R. A. 433, 48 N. E. 751. The evidence cannot be reviewed in order to set aside the verdict as excessive or against evidence. *Post v. Hathorn*, 54 N. Y. 147; *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320; *Ross v. Harden*, 10 Jones & S. 427; *Quinn v. Carr*, 4 Hun, 259; *Howie v. Greene*, 37 How. Pr. 97; *Amy v. Stein*, 16 Jones & S. 512; *Sheridan v. New York*, 12 Misc. 47, 33 N. Y. Supp. 71. But where there has been an exception taken to a refusal to direct a verdict in favor of a party against whom a verdict has been directed, the general term may consider whether there was such an absence of evidence to support a material finding that the court cannot determine as matter of law that the fact found was not proved. *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320 (per Andrews, J.).

The words "subject to the opinion of the court at general term" in an order directing a verdict and ordering exceptions to be heard in the first instance at general term, do not deprive the unsuccessful party of the benefit of the exceptions, as such words will be regarded as surplusage. *Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158. But if a verdict is ordered subject to the opinion of the general term without qualification, exceptions cannot be heard and the only question before the general term is, Which party is entitled to final judgment on the uncontroverted facts? *Ibid.*; *Byrnes v. Cohoes*, 67 N. Y. 204.

No appeal lies from the general term order denying a motion for a new trial made on the exceptions and directing the judgment to be entered on the verdict. Judgment should be entered as ordered and an appeal taken from the judgment. *Delaware, L. & W. R. Co. v. Burkhard*, 109 N. Y. 648, 16 N. E. 550. And an appeal from the judgment so entered lies directly to the court of appeals, and not to the general term which should not be required to hear an appeal from its own decision, notwithstanding a Code provision that upon denial of a motion for a new trial "judgment may be taken as if a motion for a new trial had not been." *Martin v. Platt*, 131 N. Y. 641, 30 N. E. 565. A judgment entered on an order by the appellate division overruling the exceptions denying a motion for a new trial based thereon and ordering judgment on the verdict is "a judgment of affirmance" within the meaning of a Code provision providing that no appeal lies to the court of appeals from a judgment of affirmance in an action to recover damages for injuries resulting in death, where the decision of the appellate division is unanimous. *Huda v. American Glucose Co.* 151 N. Y. 549, 45 N. E. 942.

9. Motion for nonsuit.

A motion for a nonsuit cannot be made after verdict, but only renewed when it was previously made, and leave to renew was reserved.¹

¹*Downing v. Mann*, 3 Ed. Smith, 36, 9 How. Pr. 204; *Hendrick v. Stewart*, 1 Overt. 476. And see *Onondaga County Mut. Ins. Co. v. Minard*, 2 N. Y. 98. A voluntary nonsuit cannot be taken after verdict and judgment. *Brown v. King*, 107 N. C. 313, 12 S. E. 137. Nor after the court

has directed a verdict which has been written out and is being signed by the jurors. *Ritchie v. Arnold*, 79 Ill. App. 406. Compare *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564, holding that a voluntary nonsuit may be taken after the court has withdrawn the case from the jury and has peremptorily directed the verdict.

The court is expressly authorized by statute in New York to reserve its decision on a motion for nonsuit pending the assessment of damages by the jury or their determination of any question of fact submitted to them. *Caspers v. Dry Dock, E. B. & B. R. Co.* 22 App. Div. 156, 47 N. Y. Supp. 961.

10. Motion to set aside verdict taken subject, etc.

Where a verdict is directed subject to the opinion of the court, the trial judge may at the same term set it aside and direct judgment for either party.¹

¹New York Code Civ. Proc. § 1185. In such case the other party can except § 994, and have the judgment reviewed thereon by appeal. But in the absence of an exception to the direction of the verdict, or of an appeal from the order denying the motion for a new trial, the correctness of the determination of the court in directing the verdict cannot be reviewed. *McCarthy v. Hiller*, 26 App. Div. 588, 50 N. Y. Supp. 626.

11. Further questions.

After verdict in a cause tried by jury, it is irregular to proceed to determine further questions involved in the issues by the findings of the judge¹ or by a reference.²

¹*Parker v. Laney*, 53 N. Y. 469, Rev'g 1 Thomp. & C. 590; *National Horse Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. 616. But where no objection appears the proceeding, though irregular, will be presumed to have been adopted by consent. *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711.

Nor can the court decide the case upon the evidence after the disagreement and discharge of the jury. *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99.

²See *ante*, Division XIX. § 29.

12. Dismissing for want of jurisdiction.

Under the act of Congress of March 3, 1875,¹ a circuit court of the United States may, even after verdict, entertain a motion to dismiss for want of jurisdiction.²

¹Supplement U. S. Rev. Stat. p. 175, § 5.

²*Hartog v. Memory*, 23 Fed. Rep. 835, Rev'd in 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521, on the ground that the evidence on which the circuit court acted in dismissing the suit was irrelevant and wholly immaterial to the issues, and that no opportunity was afforded the adverse party to be heard upon the motion and to rebut such evidence.

13. Certificate for costs.

Where the title to real property comes in question or any fact appears whereby either party becomes entitled to costs or to increased costs as prescribed by law, the judge may, upon the application of the party to be benefited thereby, either before or after the verdict is rendered, make a certificate stating the fact.¹

¹Such a certificate is a proper mode of ascertaining the fact, though there be no statute authorizing it. *Farrington v. Rennie*, 2 Cai. Cas. 220; *Jackson v. Randall*, 11 Johns. 405. By the New York statute, the judge is required to make it. Code Civ. Proc. § 3248.

It relates only to facts appearing upon the trial. *Willey v. Shaver*, Thomp. & C. 324; *Baine v. Rochester*, 85 N. Y. 523, *dicta*.

It is not needed in reference to an extrinsic fact, such as plaintiff's omission to present his claim against a municipal corporation to its chief fiscal officer before suing. *Baine v. Rochester*, 85 N. Y. 523. Nor can a party complain of the absence of the certificate where he is exempted from the payment of the costs personally by the order imposing them. *Meltzger v. Doll*, 91 N. Y. 365.

Where the statute expressly refers the question to the determination of the judge, a finding of the jury upon it is not necessarily conclusive upon him. *Hunt v. Leon*, 3 Johns. Cas. 140. So, by New York Code Civ. Proc. § 3248, the certificate may be made *before* or *after* verdict.

14. Certificates of probable or reasonable cause.

Circumstances which warrant suspicion¹ or reasonable doubt as to the construction of a statute² may be probable or reasonable cause under the United States statutes respecting certificates.³

Reasonable cause and probable cause mean the same thing.⁴

¹*The Gala Plaid*, 1 Brown Adm. 1, Fed. Cas. No. 5,183 (probable cause for seizure); *The George*, 1 Mason, 24 Fed. Cas. No. 5,323; *The Thompson*, 3 Wall. 155, *sub nom. The Isabella Thompson v. United States*, 18 L. ed. 55; *Locke v. United States*, 7 Cranch, 339, 3 L. ed. 364; *The Olinde Rodrigues*, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. 851; *United States v. Mexico*, 25 Fed. Rep. 924.

²*United States v. Riddle*, 5 Cranch, 311, 3 L. ed. 110; *The Friendship*, 1 Gall. 111, Fed. Cas. No. 5,125. Seizure made under a construction of a statute adopted by the secretary of the treasury in conformity with the opinion of the attorney general is made upon probable cause. *United States v. Recorder*, 2 Blatchf. 119, Fed. Cas. No. 16,130.

³United States Rev. Stat. §§ 970, 989.

⁴*United States v. One Sorrel Horse*, 22 Vt. 655; *United States v. The City of Mexico*, 25 Fed. Rep. 924.

15.— application for.

An application for a certificate of probable cause is so far distinct from the trial that the court has power to entertain it after the trial, and may hear evidence not taken at the trial.¹

¹*The Gala Plaid*, 1 Brown Adm. 1, Fed. Cas. No. 5,183 (§ 970); *United States v. Abatoir Place*, 106 U. S. 160, 27 L. ed. 128, 1 Sup. Ct. Rep. 169. An application may be made after execution issued on a judgment and need not necessarily be made before the judge who tried the cause. *Cox v. Barney*, 14 Blatchf. 289, Fed. Cas. No. 3,300.

16. Additional allowance.

Applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered, and must in all cases be made before final costs are adjusted.¹

¹New York general rule 45 (1896). But in the New York first judicial district this rule does not authorize the application to be made out of that district, even before the same judge who tried the case. *Hun v. Salter*, 92 N. Y. 651, citing Code Civ. Proc. § 769, as controlling the rule. Failure to promptly object to the making of a motion for extra allowance before a judge who did not preside at the trial is a waiver of the irregularity (*Wiley v. Long Island R. Co.* 88 Hun, 177, 34 N. Y. Supp. 415),—especially where the judge before whom the motion was made is nearly as well informed as to the nature of the issue as the judge who presided. *Wilber v. Williams*, 4 App. Div. 444, 38 N. Y. Supp. 893.

Special term and trial term not the same court within this rule. *Toch v. Toch*, 9 App. Div. 501, 41 N. Y. Supp. 353.

The "final costs" contemplated by this rule are the costs which are inserted in the final judgment rendered in the trial court. *Winne v. Fanning*, 19 Misc. 410, 44 N. Y. Supp. 262.

The effect of an adjustment of costs upon a motion for an additional allowance is not changed because other costs awarded on an application to open a default still remain to be adjusted. *Jones v. Wakefield*, 21 N. Y. Week. Dig. 287.

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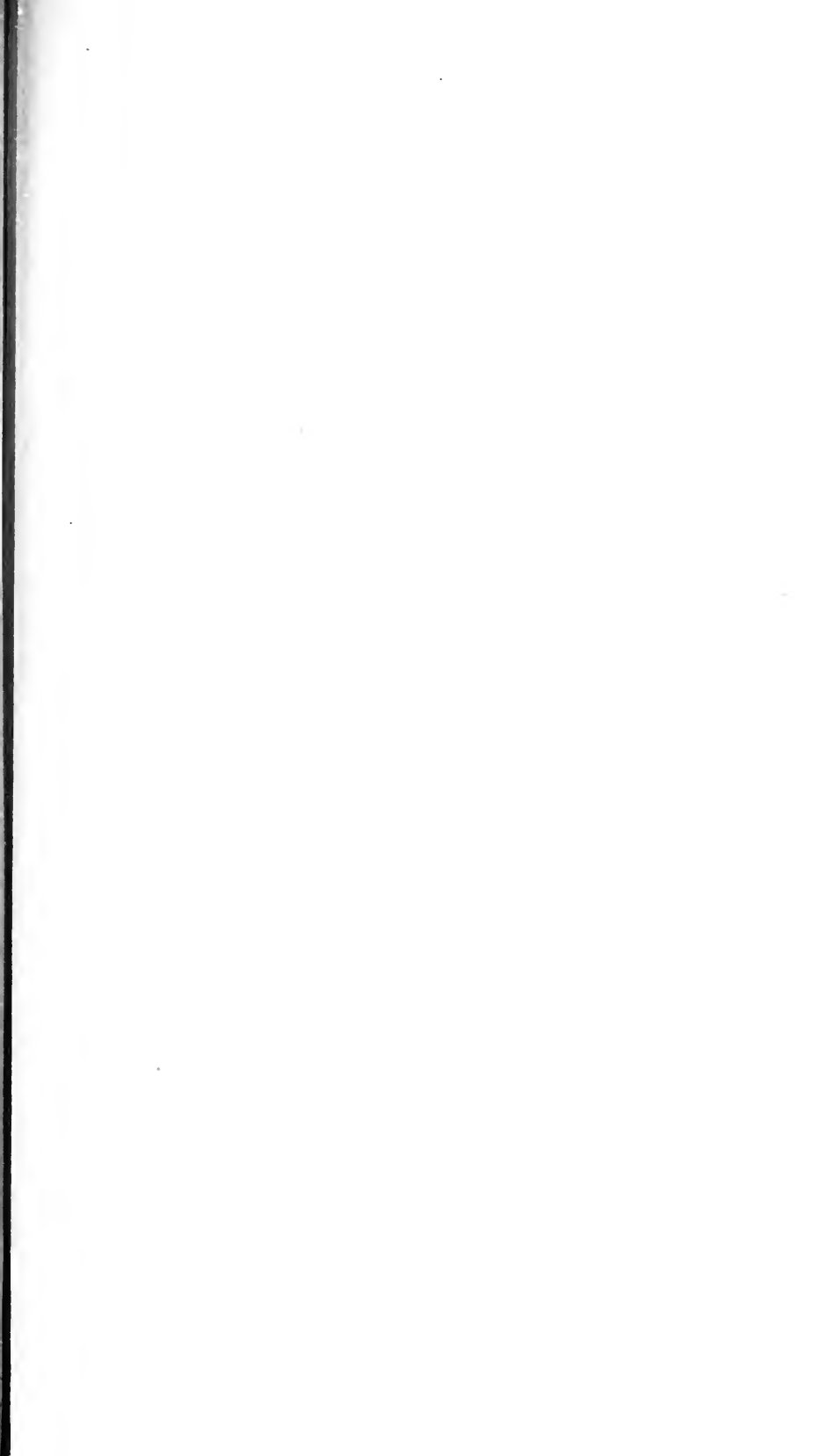
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